

CLERK'S COPY.

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**No. 329**

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**ANNE JOHNSON, PETITIONER,**

*vs.*

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

---

**PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1947.**

**CERTIORARI GRANTED OCTOBER 27, 1947.**

**No. 11407**

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**United States  
Circuit Court of Appeals**

**For the Ninth Circuit.**

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**ANNE JOHNSON,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Transcript of Record**

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**Upon Appeal from the District Court of the United States  
for the Western District of Washington  
Northern Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**H. SYLVESTER GARVIN,**

Attorneys for Appellant,

955 Dexter Horton Building,

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**J. CHARLES DENNIS,**

**ALLAN POMEROY,**

Attorneys for Appellee,

1012 U. S. Court House,

Seattle, Washington. [1\*]

2/

*Anne Johnson vs.*

United States District Court, Western District of  
Washington, Northern Division

No. 46990

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**ANNE JOHNSON, alias Anne Dwyer,**

**Defendant.**

**INDICTMENT**

The Grand Jury charges:

**Count I.**

On or about the 8th day of April, 1946, at Seattle, Washington, Anne Johnson, alias Anne Dwyer, purchased approximately 85 grains of opium prepared for smoking, which was not then in nor from the original stamped package.

All in violation of Title 26, U.S.C. Sec. 2553a.

**Count II.**

On or about the 8th day of April, 1946, at Seattle, Washington, Anne Johnson, alias Anne Dwyer, knowingly received and concealed 85 grains of opium prepared for smoking, which opium had theretofore been imported and brought into the United States of America contrary to law, and Anne Johnson, alias Anne Dwyer, then knew said opium had been so imported.

All in violation of Title 21, U.S.C. Sec. 174. [2]



*United States of America*

3

Count IH.

On or about the 8th day of April, 1946, at Seattle, Washington, Anne Johnson, alias Anne Dwyer, purchased approximately 41 grains of yen shee, partially smoked opium prepared for smoking, which was not then in nor from the original stamped package.

All in violation of Title 26, U.S.C. Sec. 2553a.

Count IV.

On or about the 8th day of April, 1946, at Seattle, Washington, Anne Johnson, alias Anne Dwyer, knowingly received and concealed 41 grains of yen shee, partially smoked opium prepared for smoking, which had theretofore been imported into the United States of America contrary to law, and Anne Johnson, alias Anne Dwyer, then knew said opium had been so imported.

All in violation of Title 21, U.S.C. Sec. 174.

A True Bill.

DENT KELLER,

Foreman.

J. CHARLES DENNIS,

United States Attorney.

ALLAN POMEROY,

Asst. United States Attorney.

[Endorsed] Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court June 12, 1946. [3]

*Anne Johnson vs.*

[Title of District Court and Cause.]

### ARRAIGNMENT AND PLEA

Now on this 25th day of June, 1946, this matter comes on for arraignment and plea and hearing all legal questions that may be pending. Tom A. Durham, Asst. District Attorney, appears for plaintiff, and Herbert L. Onstad, attorney, appearing for defendant, Anne Johnson alias Anne Dwyer. At this time defendant states her true name is Anne Johnson. Reading of the indictment is waived. Defendant enters a plea of not guilty to all counts, subject to move against the indictment by Friday, June 28, 1946. All pending motions ordered heard Monday, July 1, 1946, at 10:00 a.m.

Ent. order setting the case for trial Tuesday, July 23, 1946, at 10:00 a.m., 2nd case. [4]

[Title of District Court and Cause.]

### MOTION TO SUPPRESS EVIDENCE

Comes now the above-named defendant, Anne Johnson, and moves the court to quash, suppress and withhold from the jury all evidence obtained by the police officers and officers of the narcotics division of the United States Government on the 8th day of April, 1946, from defendant's sleeping room, being No. 1 of the Europe Hotel located at 2016 First Avenue, City of Seattle, for the following reasons, to-wit:

That the search and seizure of said evidence was illegal and in violation of the constitutional rights of the defendant and that the evidence obtained, and anything occurring in connection therewith, is incompetent and should be suppressed. That the property taken from defendant's room was then taken unlawfully by reason of the unlawful search of the officers and in violation of the law and more especially in violation of the Fourth and Fifth Amendments of the Constitution of the United States.

Wherefore, defendant moves and prays that all the evidence obtained by said officers as aforesaid be quashed, suppressed and withheld from the jury and a date be set, if the court so desires, for taking of oral testimony of said officers of the United States who arrested defendant, in order that the court may hear the facts and take such action as the court seems meet and proper herein.

ANNE JOHNSON,

Petitioner. [5]

State of Washington,  
County of King—ss.

Anne Johnson, being first duly sworn, on oath deposes and says that she is the petitioner and defendant herein; that she has read the foregoing

petition; knows the contents thereof and believes the same to be true.

ANNE JOHNSON.

Subscribed and sworn to before me this 26th day of June, 1946.

HERBERT L. ONSTAD,

Notary Public in and for the State of Washington,  
residing at Seattle.

Received a copy of the within Motion this 26th day of June, 1946.

J. CHARLES DENNIS,

Attorney for U. S.

[Endorsed]: Filed June 26, 1946. [6]

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[Title of District Court and Cause.]

AFFIDAVIT

United States of America,  
State of Washington,  
County of King—ss.

Comes now Anne Johnson, the above-named defendant, and states that she is a resident of Seattle, King County, Washington, and resides in Room 1 at the Europe Hotel which is located at 2016 First Avenue in the City of Seattle;

That on or about 9:00 o'clock on the 8th day of April, 1946, police officers and officers of the narcotics division of the United States Government forced their way into Room 1, which is the sleep-

ing room of affiant, and illegally and unlawfully and without a search warrant or any other authority of law, searched Room, 1, which is the premises of affiant, and seized evidence which they intend to use in the pending trial of affiant. That said search and seizure was in violation of the Constitution and more particularly of the Fourth and Fifth Amendments thereto.

Affiant states that at the time and place above alleged she had undressed and gone to sleep and that she was wakened by a loud rapping on the door and shortly thereafter a kicking on the bottom of her door. Upon being wakened affiant asked, "Who is it?" A voice outside her door said "Mayor Devin. Let us in or we'll kick the door down." Affiant said, "Just a minute while I put my clothes on." Affiant [7] then dressed and unlocked and opened the door and four men came in who she later found out to be police and federal narcotic agents. Affiant asked them what they wanted and one officer stated, "You'll find out"; and the other officers were already starting and proceeding to search the room and property of affiant; that said sleeping room was a very small room, about nine feet by twelve feet, and said officers searched everything in said room for a period of approximately forty-five minutes and they found a paper sack in affiant's bed which contained an opium bottle pipe and opium, the quantity which is unknown to affiant. That the yen shee was found in a man's suitcase which contained articles of men's clothing and it was loose and being mixed with



clothing therein contained; that five days before affiant's arrest she took a suitcase belonging to Solomon B. Zissu who had occupied Room 20 of affiant's hotel for four weeks down to affiant's Room 1 as Mr. Zissu called affiant on the phone stating he was giving up the room and would call for his suitcase Saturday, which would be April 6th; that affiant looked in the suitcase and saw what appeared to be an opium outfit; that affiant knew Zissu for a number of years and that he had befriended affiant and had loaned affiant \$650.00 to help purchase the hotel where she was arrested; that Mr. Zissu was a sick man and told affiant that it was necessary for him to take a pill of opium quite often for his heart; that Mr. Zissu did not come Saturday and came Monday about 7:30 and asked affiant for the key to her room and that affiant gave him her key and then affiant went to her mother's apartment in said hotel for dinner. About 8:30 Mr. Zissu came to mother's apartment and handed back affiant her key. Shortly afterwards affiant went to her room, being Room No 1, and undressed and went to bed. Affiant saw the said suitcase [8] was not gone and when the officers knocked and threatened to kick her door in, affiant dressed and then took the paper bag which contained the opium pipe and opium out of the suitcase and hid it in her bed. The officers found the yen shee grains or powder loose in the suitcase shortly after they proceeded to search as above stated and in said suitcase there were some articles of men's clothes; that said yen shee, as far as affiant knows, was not wrapped up

but was scattered all over the bottom of the suitcase and mixed in with the clothes. The officers did not find the paper bag containing the pipe and opium for about forty-five minutes.

Wherefore, affiant prays that all of said evidence be suppressed and that the United States Attorney and the United States narcotic agents be restrained from using any of said evidence seized from the premises of affiant against affiant in any trial or trials brought by the United States Government against her.

**ANNE JOHNSON,**

**Affiant and Defendant.**

Subscribed and sworn to before me this 26th day of June, 1946.

**HERBERT L. ONSTAD,**

Notary Public in and for the State of Washington,  
residing at Seattle.

Received a copy of the within Affidavit this 26th day of June, 1946.

**J. CHARLES DENNIS,**

**Attorney for U. S.**

**[Endorsed]: Filed June 26, 1946. [9]**

[Title of District Court and Cause.]

**AFFIDAVIT IN OPPOSITION TO DEFEND-  
ANT'S MOTION TO SUPPRESS EVIDENCE**

United States of America,  
Western District of Washington,  
Northern Division—ss.

Joseph E. Goode, being first duly sworn, on oath deposes and says: That he is a narcotic agent, United States Bureau of Narcotics, Treasury Department, Seattle, Washington, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

This affiant has been a member of the United States Bureau of Narcotics for twenty-two years and has a thorough knowledge of narcotics and their use.

On April 8, 1946, upon receiving information that unknown persons were smoking opium in the Europe Hotel, 2016 First Ave., Seattle, Washington, Narcotic Officers Walter G. Graben, Harold A. Moodie, Henry L. Giordano and Lt. Detective Gilbert T. Belland of the Seattle Police Department and myself proceeded to the above named hotel about 8:30 p. m.

Lt. Belland and Mr. Giordano entered the hotel, leaving the rest of the officers present on the street, for the purpose of interviewing the manager. In approximately three minutes Mr. Giordano returned and asked us to accompany him into the

building. Upon entering the hotel there was a strong odor [10] of smoking opium, and approaching the door of the manager's room, which was on the second floor, the odor of smoking opium emanating from that particular room, which was Room No. 1, was very strong. Lt. Belland knocked on the door and after a short time a person inside asked who was there, and Lt. Belland replied "Lieutenant Belland." The defendant then opened the door and admitted all of those present, including Officer Walter G. Graben, Lt. Belland and myself. As the fumes of smoking opium were very strong in the room we immediately placed the defendant under arrest and a search started. The defendant's mother entered the room and the defendant stepped out into the hall with Lt. Belland. Then Inspector Graben turned back the bed covers and discovered in the bed a one-ounce ointment jar containing 85 grains of opium prepared for smoking, with no marks or other labels, and a makeshift opium pipe which was hot. There were also found in the room 23 grains of yen shée lying loose on a Chinese brass tray, also a metal lamp base, one metal funnel and two yen hocks, as well as a pair of scissors.

JOSEPH E. GOODE.

Subscribed and sworn to before me this 28th day of June, 1946.

TRUMAN EGGER,

Chief Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed. [11]

[Title of District Court and Cause.]

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

United States of America,  
Western District of Washington,  
Northern Division—ss.

Gilbert T. Belland, being first duly sworn, on oath deposes and says: That he is a Lieutenant Detective of the Seattle Police Department assigned to the Narcotic Detail, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

That I have been a member of the Narcotic Detail of the Seattle Police Department since 1934, and have a thorough knowledge of narcotics and their use, and narcotic addicts.

On or about April 8, 1946, upon receiving information from a confidential informer that unknown persons were smoking opium in the Europe Hotel, 2016 First Ave., Seattle, Washington, Narcotic Officers Walter G. Graben, Joseph E. Goode, Harold A. Moodie, Henry L. Giordano and myself proceeded to the hotel about 8:30 p.m. Mr. Giordano and myself entered the street door of the hotel, leaving the other officers on the street, we immediately detected a strong odor of smoking opium which we were easily able to follow up the first flight of stairs to Room 1, which was the manager's [12] room. There was a strong odor of smoking opium emanating from that particular room. I sent Mr. Giordano back to bring the other officers. When they arrived in front of Room No.



1, Mr. Giordano stepped down the corridor to check the fire-escape and I knocked on the door of Room No. 1. After a short delay someone in the room asked who was there, and I replied "Lieutenant Belland." The door was opened by the defendant approximately two minutes later and we were invited to enter. As the odor of smoking opium was very strong, we immediately placed the defendant under arrest and started the search of the room. The defendant went over and sat on her bed; several minutes later her mother entered the room. The defendant then arose and stepped into the hallway with me, where she advised me that she would turn over the smoking opium to me if I would have her mother taken from the room. However, before the defendant's mother could leave the room, Mr. Graben turned back the bed covers on the defendant's bed and found a one-ounce ointment jar containing 85 grains of opium prepared for smoking with no marks or other labels, and a makeshift opium pipe which was hot; there were also found in the room 23 grains of yen shee lying loose on a Chinese brass tray, also a metal lamp base, one metal funnel and two yen hocks, as well as a pair of scissors.

GILBERT T. BELLAND.

Subscribed and sworn to before me this 23th day of June, 1946.

TRUMAN EGGER,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed June 28, 1946. [13]

[Title of District Court and Cause.]

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

United States of America,  
Western District of Washington,  
Northern Division—ss.

✓ Walter G. Graben, being first duly sworn, on oath deposes and says: That he is a narcotic inspector, United States Bureau of Narcotics, Treasury Department, Seattle, Washington, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

This affiant has been a member of the United States Bureau of Narcotics for twenty-one years and has a thorough knowledge of narcotics and their use.

On April 8, 1946, upon receiving information that unknown persons were smoking opium in the Europe Hotel, 2016 First Ave., Seattle, Washington, Narcotic Officers Joseph E. Goode, Harold A. Moodie, Henry L. Giordano and Lt. Detective Gilbert T. Belland of the Seattle Police Department and myself proceeded to the above named hotel about 8:30 p.m. Lt. Belland and Mr. Giordano entered the hotel, leaving the rest of those present on the street, for the purpose of interviewing the manager. In approximately three minutes Mr. Giordano returned and asked us to accompany him

into the building. Upon entering the hotel there was a strong odor [14] of smoking opium, and approaching the door of the manager's room, which was on the second floor, the odor of smoking opium emanating from that particular room, which was Room No. 1, was very strong. Lt. Belland knocked on the door and after a short time a person inside asked who was there, and Lt. Belland replied "Lieutenant Belland." The defendant then opened the door and admitted all of those present, including Officers Joseph E. Goode, Lt. Belland and myself. As the fumes of smoking opium were very strong in the room we immediately placed the defendant under arrest and a search started. The defendant was sitting on the bed when a minute or two after our entrance her mother came into the room. The defendant then stood up and stepped into the hall with Lt. Belland. When she stood up, I pulled back the bed covers and discovered in the bed a one-ounce ointment jar containing 85 grains of opium prepared for smoking, with no marks or other labels, and a makeshift opium pipe which was hot. There were also found in the room 23 grains of yen shee lying loose on a Chinese brass

tray, also a metal lamp base, one metal funnel and two yen hocks, as well as a pair of scissors.

WALTER G. GRABEN.

Subscribed and sworn to before me this 29th day of June, 1946:

SIGFRIED PETTYS,

Deputy Clerk, U. S. District Court, Western District of Washington.

Copy received 29th day of June, 1946.

GATES, MONTGOMERY &  
ONSTAD,

Attorneys for Defendant.

[Endorsed]: Filed June 29, 1946. [15]

[Title of District Court and Cause.]

AFFIDAVIT.

United States of America,  
Western District of Washington,  
Northern Division—ss.

Kay Doran, being first duly sworn, on oath deposes and says: That she is a roomer at the Europe Hotel, 2016 First Avenue, Seattle, Washington; that on or about 9:00 o'clock on the evening of April 8, 1946, affiant and Amelia Dauenhauer, the



mother of Anne Johnson, were sewing curtains in Rooms 4 and 7 of said hotel, these rooms are combined—being a kitchen and a parlor. I heard a loud banging and hitting of a door in a hall outside somewhere in the hotel. I thought somebody was trying to break in somebody's room and I opened the door of Room 4 and put my head out. I saw two or three men just entering Room 1. Then I asked these men "What is it you want?" Then a big man came very fast toward me and grabbed me by my arm and said, "You are coming here too." Anne Johnson was sitting on the bed and these men were searching the room. Then this officer asked me if I couldn't smell something. I said, "Yes, it's incense," so I picked up the incense box on her desk and I showed them this and there is a tray on her desk where she burns incense three or four times a day to keep the smell down as she has a mother cat and four kittens there. Then he asked me my name and I told him, and he asked me if I was a roomer there [16] and I said "Yes." Then the officer lead the defendant's mother in. She is about sixty years of age. I heard her say to these officers, "Can't a woman go to the bathroom without being bothered?" This was ten or fifteen minutes after I had been under arrest and been ordered to stay right there. Then Anne's mother sat on the bed alongside Anne and she was crying and after another ten or fifteen minutes Anne Johnson got up and went outside with an officer and I heard her say "That they have nothing to do with this room whatever, as one is my mother and the



other is a roomer." Then Officer Belland came and told us we could leave. The officers were still searching when we left to go to our rooms. There was no smell in the hallway that was unusual and the only smell that I could smell was the usual smell of incense, both in the hallway and Room 1. I have been in Room 1 many times a week for a period of eight months and on this particular night there was no unusual aroma in the hallway or in the room and no unusual smell.

Anne Johnson and I lived together in the same house in Nome, Alaska, for two years, being 1941 and 1942, and we both worked for Mr. Jacobs, who was a photographer and undertaker there. I have also been in close association with her here for the past eight months and I know she has never used narcotics in any form, shape or manner.

On April 7th, which was Sunday, Anne Johnson was painting the hallway in the afternoon and evening ~~and~~ quit painting about 10:30 that night. The next morning she painted till about 11:00 o'clock and we had breakfast together and went to Sears Roebuck and bought hall rugs and curtains. We arrived back about 6:15 p.m. Anne's mother then started to prepare dinner and we started eating about 7:30, the exact time affiant does not know. After dinner [17] Anne said she was going to take a bath and rest for a while, which she did.

Affiant and Anne's mother did the dishes and

measured the curtains and we were starting to sew them when the officers came.

KAY DORAN.

Subscribed and sworn to before me this 29th day of June, 1946.

HERBERT L. ONSTAD,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received 1st day of July, 1946.

TOM A. DURHAM,

Asst. U. S. Attorney.

[Endorsed]: Filed July 1, 1946. [18]

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[Title of District Court and Cause:]

ORDER DENYING DEFENDANT'S MOTION  
FOR SUPPRESSION OF EVIDENCE

A motion having come on to be heard before me on the 1st day of July, 1946, for an order directing the suppression and return of certain articles, opium and yen shee which was seized by Narcotic Officers in the sleeping room of the defendant more particularly set forth in the moving petition heretofore filed upon the grounds that the said above-named items were seized in violation of the constitutional rights of the defendant, and after due deliberation having been had and after reading the affidavits filed on behalf of the defendant herein and the affidavits filed in controversy of said affi-

davits by plaintiff herein and having heard argument on behalf of said motion by Heroert L. Onstad, attorney for said defendant, and Tom A. Durham, Deputy United States District Attorney, and the Court being fully and duly advised in the premises, and upon the opinion of the Court herein rendered on the 1st day of July, 1946, it is hereby

Ordered, that the said motion to suppress evidence, as aforesaid, be and the same hereby is denied.

Exceptions allowed.

Done in Open Court this 20th day of July, 1946.

JOHN C. BOWEN,

United States District Judge.

Presented by:

HERBERT L. ONSTAD,

Attorney for Defendant.

O.K. as to form:

ALLAN POMEROY,

Asst. U. S. Attorney,

Attorney for Plaintiff.

[Endorsed]: Filed July 20, 1946. [20]

[Title of District Court and Cause.]

### VERDICT

We, the Jury in the above-entitled cause, find the defendant Anne Johnson:

Is guilty as charged in Count I of the Indict-

ment; and further find the defendant Anne Johnson is guilty as charged in Count II of the Indictment; and further find the defendant Annie Johnson is guilty as charged in Count III of the Indictment; and further find the defendant Anne Johnson is guilty as charged in Count IV of the Indictment.

GEORGE W. JOHNSTON,

Foreman.

[Endorsed]: Filed July 24, 1946. [21]

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant, Anne Johnson, alias Anne Dwyer, and moves the court for a new trial on the grounds and for the reasons as follows:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial.
2. Misconduct of the jury.
3. Accident or surprise which ordinary prudence could not have guarded against.
4. Insufficiency of the evidence to justify the verdict or other decision.
5. Error in law occurring at the trial.

## 6. Misconduct of counsel.

HERBERT L. ONSTAD,  
Attorney for Defendant.

Received a copy of the within Motion this 26th day of July, 1946.

J. CHARLES DENNIS,  
Attorney for Plaintiff.

[Endorsed]: Filed July 26, 1946. [22]

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Now on this 29th day of July, 1946, this matter comes on for motion for new trial. The motion is called, argued and denied. Allan Pomeroy, Asst. District Attorney, appears for plaintiff, and defendant, Anne Johnson, is represented by Herbert L. Onstad. \* \* \* \* [23]



United States District Court, Western District of  
Washington, Northern Division

No. 46990

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANNE JOHNSON,

Defendant.

**JUDGMENT, SENTENCE, COMMITMENT  
AND ORDER OF PROBATION**

On this 5th day of August, 1946, the attorney for the Government and the defendant appearing in person, the defendant being represented by Herbert L. Onstad, her attorney, and the Court finding the following:

That prior to the entry of her plea, a copy of the indictment was given to the defendant and that the defendant entered a plea of Not Guilty and a trial was held, resulting in a verdict of guilty as to Counts I, II, III and IV, that the Probation Officer for this District has made a pre-sentence investigation and report to the Court, Now, Therefore,

It Is Adjudged that the defendant has been convicted upon a verdict of the jury finding the defendant Guilty of the offense of violation of Section 2553a, Title 26, U.S.C., as charged in Counts I and III of the indictment, and Section 174, Title 21, U.S.C., as charged in Counts II and IV of the

indictment; and the Court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It Is Adjudged that the defendant is guilty as charged in Counts I, II, III and IV of the indictment, and is [24] convicted.

It Is Ordered and Adjudged that the defendant is hereby committed to the custody of the Attorney General of the United States for imprisonment in the Federal Reformatory for Women, Alderson, West Virginia, or such other like institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Eighteen (18) Months and to pay to the United States of America a fine of Two Hundred Fifty (\$250.00) Dollars on Count I, and shall stand committed until said fine is paid.

It Is Ordered and Adjudged, the Court being of the opinion that the ends of justice and best interests of the public as well as the defendant will be subserved by the suspension of imposition of sentence on Count II against the defendant, that the imposition of sentence herein on Count II be suspended and the defendant placed on probation for a period of Five (5) years commencing on this date, August 5, 1946, during the defendant's good behavior and during which time the said defendant shall be placed upon probation as provided by the statutes of the United States relative to probation,

until further order of the Court, and upon the express condition that the said defendant does not during said probationary period violate any laws of the United States or of any State or community where she may be, and shall report regularly to the United States Probation Officer at the times and in the manner said Officer shall direct; and upon the further condition that said defendant shall not unlawfully handle or use narcotics in any manner whatsoever.

It Is Further Ordered and Adjudged that the defendant is hereby committed to the custody of the Attorney [25] General of the United States for confinement in the Federal Reformatory for Women, Alderson, West Virginia, or such other like institution as the Attorney General of the United States or his authorized representative may by law designate for the period of One (1) Day on each of Counts III and IV of the indictment, with the execution of the sentence on Counts III and IV as to imprisonment to run concurrently with and not consecutively to the execution of sentence imposed on Count I, and further that on each of Counts III and IV the defendant shall pay to the United States of America a fine of One (\$1.00) Dollar, and shall stand committed until said fine is paid.

It Is Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or

other qualified officer, and that a copy serve as the commitment of the defendant.

**JOHN C. BOWEN,**

United States District Judge.

Presented by:

**TOM A. DURHAM,**

Asst. United States Attorney.

Vio. Sec. 2553a, Title 26, U.S.C. (Harrison Narcotic Law) and Sec. 174, Title 21, U.S.C. Narcotic Drugs Imp. & Exp. Act.)

[Endorsed]: Filed August 5, 1946. [26]

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[Title of District Court and Cause.]

**NOTICE OF APPEAL.**

Name and address of Appellant: Anne Johnson, 2016 1st Avenue, Seattle, Washington.

Name and address of Appellant's attorneys: H. Sylvester Garvin and Anthony Savage, 955 Dexter Horton Building, Seattle, 4, Washington.

Offense: Violation of Harrison-Narcotics Law and Narcotics Alien and Export Act. 1. 2553—Title 26 USCA; 2. 174—Title 21 USCA; 3. 2553a—Title 26 USCA; 4. 174 Title 21 USCA.

**Judgment and Sentence**

Count 1. Appellant was sentenced to the Federal Reformatory for Women at Alderson, West

Virginia, for a term of eighteen months, and to pay a fine of \$250.00 and stand committed until paid.

Count 2. Imposition of sentence was suspended for five years and probation granted commencing August 5, 1946.

Counts 3 and 4: The Appellant was sentenced to the Federal Reformatory for Women, Alderson, West Virginia, for one day. Execution of said sentence to run concurrently with the sentence on Count 1; and further on Counts 3 and 4; the Appellant was to pay a fine of \$1.00 with commitment until paid.

The Appellant is now on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit [27] from the above-stated judgment.

Dated this 8th day of August, 1946.

**ANNE JOHNSON,**  
Appellant.

**H. SYLVESTER GARVIN,**  
**ANTHONY SAVAGE,**  
Attorneys for Appellant.

Received a copy of the within Notice of Appeal this 8th day of Aug. 1946.

**J. CHARLES DENNIS,**  
Attorney for Appellant.



[Title of District Court and Cause.]

## APPEAL BOND

Whereas, Anne Johnson, as principal, has heretofore been convicted in the United States District Court for the Western District of Washington, Northern Division, and sentenced upon Counts I, II, III and IV of the said indictment, and the bond having heretofore been fixed by the Court in the sum of Two Thousand Dollars (\$2,000.00) and said cash having heretofore been deposited in the registry of the District Court, and it being the intention of the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the condition of this bond being as follows:

Whereas, the said Anne Johnson shall diligently prosecute her appeal to the Circuit Court of Appeals for the Ninth Circuit, that she shall be firmly bound by the conditions of this bond, and if the said cause on appeal be affirmed then she shall surrender herself in execution of the said judgment and sentence and if the said cause be reversed by the said Circuit Court of Appeals that she shall personally appear in accordance with the said reversal for retrial, from day to day when ordered by the Court and shall at all times comply with any and all orders of the Court, and for these purposes this bond shall be in full force and effect; and if all [29] conditions are complied with by the said Anne Johnson, the principal, until the final disposition of the said case, then this bond shall be held for naught.

Dated at Seattle, Washington, this 5th day of August, 1946.

/s/ ANNE JOHNSON,  
Principal.

Approved as to form:

TOM A. DURHAM,  
Asst. United States Attorney.

Approved:

JOHN C. BOWEN,  
United States District Judge.

[Endorsed]: Filed Aug. 5, 1946. [30]

[Title of District Court and Cause.]

**STATEMENT OF POINTS UPON WHICH  
APPELLANT RELIES, AND PORTIONS  
OF THE RECORD RELATING THERETO**

Appellant, Anne Johnson, relies in this appeal upon the following points, to-wit:

1. The Court erred in denying the Defendant's Petition to Suppress.

The portions of the record necessary for the consideration of this point are:

a. Indictment.

b. The Petition to Suppress and the Affidavit in Support thereof.

c. Affidavit of James A. Goode.

d. Affidavit of Gilbert T. Belland.

e. Affidavit of Walter A. Graben.

f. Affidavit of Kay Doran.

g. Order denying Petition to Suppress.

2. The Assistant United States Attorney committed prejudicial error in his argument to the jury.

The portions of the record necessary for the consideration of this point are:

a. Pages 188 to 194 Inc. of the Reporter's Transcript of Testimony.

Record Page No. 192.

b. The Court's instructions to the Jury, Pages 195 to 209 of the Reporter's Transcript of Testimony.

Record Page No. 198.

[31]

3. The Court erred in denying the Defendant's Motions for Directed Verdict with respect to Each and Every Count in the Indictment.

The portions of the record necessary for the consideration of this point are:

a. Pages 86 to 91 and 156 of the Reporter's Transcript of Testimony.

Record Page No. 107 to 111 and 165.

ANTHONY SAVAGE

H. SYLVESTER GARVIN

Attorneys for Defendant-  
Appellant.

Received a copy of the within Statement of  
Points this 23rd day of Aug. 1946.

/s/ CHARLES DENNIS,

Attorney for U. S.

[Endorsed]: Filed: Aug. 23, 1946. [32]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF POR-  
TIONS OF RECORD TO BE CONTAINED  
ON APPEAL.

Comes now Anne Johnson, the, appellant, and  
hereby designates the contents of the record on  
appeal in the above cause:

File No.

1. Indictment ..... 1

2. Plea

3. Petition to Suppress and Defendant's  
Affidavit in support thereof ..... 2

4. Affidavit of James E. Goode ..... 4

	File No.
5. Affidavit of Gilbert T. Belland .....	5
6. Affidavit of Walter A. Graben .....	6
7. Affidavit of Kay Doran .....	7
8. Order Denying Defendant's Petition to Suppress .....	10
9. Verdict of the Jury .....	13
10. Motion for New Trial .....	14
11. Order Denying New Trial .....	
12. Judgment and Sentence .....	16
13. Notice of Appeal .....	18
14. Bond on Appeal .....	17
15. Reporter's Transcript of Evidence and Proceedings .....	
16. Copy of This Designation .....	

ANTHONY SAVAGE,

H. SYLVESTER GARVIN,

Attorneys for Defendant

Appellant.

Received a copy of the within Designation this  
23rd day of Aug. 1946.

/s/ J. CHARLES DENNIS,

Attorney for U. S.

[Endorsed]: Filed: Aug. 23, 1946. [33]



[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD  
ON APPEAL.

United States of America,

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 33, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the reporter's transcript of testimony and proceedings transmitted as a part hereof, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [34]

Clerk's fees for making record, certificate or return:

22 pages at 40c .....	\$ 8.80
9 pages at 10c (Copies furnished) .....	.90
Appeal Fee .....	5.00
Total .....	\$14.70

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 6th day of August, 1946.

(Seal)

MILLARD P. THOMAS,

Clerk.

By /s/ TRUMAN EGGER,

Chief Deputy Clerk.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 46990.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANNE JOHNSON, alias Anne Dwyer,

Defendant.

Before: The Honorable John C. Bowen, District  
Judge, and a Jury.

Appearances:

J. Charles Dennis, Esq., United States District  
Attorney, and Allan Pomeroy, Esq., Assistant  
United States District Attorney, appearing for the  
Plaintiff.

Herbert L. Onstad, Esq., appearing for the De-  
fendant.

Whereupon, a jury having been duly impaneled,  
the following proceedings were had and done, to-  
wit: [1\*]

Seattle, Washington, July 23, 1946, 10:00 a. m.

### PROCEEDINGS

(Opening Statements were made on behalf of  
Plaintiff and Defendant, respectively.)

The Court: The Plaintiff may call its first wit-  
ness.

\*Page numbering appearing at top of page of original Reporter's  
Transcript.

**GILBERT T. BELLAND**

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Pomeroy: If the Court please, at this time I wish to state for the record that there is a stipulation which has been entered into between the defendant and the government. That stipulation is that the exhibits to be introduced in this trial are opium and Yen Shee; that does away with the necessity of calling [2] a Government chemist—is that correct?

Mr. Onstad: Lieutenant Belland or any other narcotic agent can testify it was opium but I would ask for no further proof of it.

Mr. Pomeroy: I have a man here to testify to it. They couldn't testify to that because they don't know. It would have to be the chemist to testify.

The Court: Let the record show that the stipulation suggested is not agreed upon.

**Direct Examination**

By Mr. Pomeroy:

Q. State your name to the Court.

A. Gilbert T. Belland.

Q. Your occupation?

A. Detective Lieutenant in the Seattle Police Department in Charge of the Narcotic Squad.

Q. Do you know the defendant, Anne Johnson?

A. I do now.

Q. When did you first know who she was.

(Testimony of Gilbert T. Belland.)

A. On the night of April 8, 1946.

Q. Was she under that name at that time?

A. Anne Dwyer, she was using at that time. She asked if it was all right to be booked under the name of Anne Johnson. [3]

Q. Anne Dwyer you knew her as?

A. That is right.

Q. Directing your attention to the first time you saw her, were you on duty? A. I was.

Q. State where you were when you first saw Anne Johnson?

A. I believe it was about a quarter to nine or near 9:00 p. m., on April 8, at her room in the Europe Hotel; it was Room Number 1.

Q. When you went to the Europe Hotel, what other persons, if any, were with you?

A. Federal Narcotics Agents Henry L. Giordano; Narcotic Inspector Walter Graben; and Narcotic Agent Harold Moodie; and Narcotic Agent Joseph E. Goode.

Q. Where had you met these other officers that evening?

A. About 8:10 or 8:15 I met them on Jackson Street.

Q. Then did you proceed later to the Europe Hotel after you had met them?

A. They were in the process of completing a narcotic case against Robert Scott.

Q. Regardless of that, later on that evening you proceeded to the Europe Hotel, is that right?



(Testimony of Gilbert T. Belland.)

A. As soon as we disposed of the prisoner, I hurried them right up there.

Q. What was the purpose of your going to that hotel? [4]

A. I had been advised about twenty minutes to eight by a confidential informer that there were unknown persons smoking opium in the Europe Hotel at that time. I hurried to contact the officers. We went up there as quickly as we could get there.

Q. After you arrived at the Europe Hotel, just tell the jury exactly what occurred.

A. When we arrived at the Europe Hotel, Narcotic Agent Henry L. Giordano accompanied me up in the hotel. We went in there for the purpose of interviewing the manager of that hotel to ascertain what information she might give us on anyone that would be using narcotics in there at that time. As we came up the stairs there was a strong odor of opium smell. It led us right to **Room Number 1**, the room of the defendant. As I stood in front of the door there was a strong odor coming out between the sill and the door. I requested Narcotic Agent Giordano to go down and get the other boys to come up, and leave one on the outside. I waited about a minute and he came back with two of the agents.

At that time I rapped on the door and I heard the defendant state, "Who is it?" "This is Detective Lieutenant Belland," I said, and she said, "Just a minute." I waited about a minute and I rapped again. [5] She again stated "Just a minute."

(Testimony of Gilbert T. Belland.)

I heard some shuffling or noise in the room. Shortly after she came to the door and opened it. I said "I want to talk to you a little bit." She stepped back acquiescently and admitted us. ~~Then she took~~ her seat at the head of the bed. I said "I want to talk to you about this opium smell in the room here." She said, "There is no opium smell in the room here." I said, "I want you to consider yourself under arrest because we are going to search the room."

So the boys proceeded to look around the room.

There was some evidence of Yen Shee found in the suitcase there, and some clothing.

Her mother came to the door—came in—and she looked at me and nodded to me to step out. So her and I stepped outside of the door.

Q. Who stepped out of the door?

A. The Defendant, Anne Dwyer, or Anne Johnson. She stated to me—"If you will get my mother out of here and back to her room I will come up with the opium." I said, "O. K."

About that time Federal Narcotic Inspector Graben had uncovered the opium, which was on a brass tray in a small jar with a home-made opium pipe and some Yen Shee. [6]

(Opium paraphernalia, scissors, hocks, funnel, lamp base and tray marked Plaintiff's Exhibit 1 for Identification.)

By Mr. Pomeroy:

Q. You are being handed what has been marked

(Testimony of Gilbert T. Belland.)

Plaintiff's Exhibit 1 for Identification; will you state what that is?

A. Just a plain brass tray that they usually set their equipment on. There is the bottom of a lamp and shears and yen hocks which is used in rolling the pills over the lamp.

Q. Yen hocks are used for what?

A. Dipping into the opium and rolling it into the lamp.

Q. State where you saw this exhibit the first time.

A. This was right at the head of her bed; apparently it must have been under her pillow or under the covers where she was seated, because she was sitting right there where this thing was found when I stepped into the room. When the covers were pulled back, there it was.

Q. All of these items in Exhibit 1 were there?

A. They were right there.

Q. These scissors were there, were they?

A. Yes.

Q. And these two long objects here,—you call them the [8] yen hocks?

A. Yen Hocks.

Q. What are they used for did you say?

A. They are used for dipping into the opium jar and extracting the opium and holding it in the lamp,—

Q. What is this object here—

A. —or the pipe, rather.

Q. What is this brass object?

(Testimony of Gilbert T. Belland.)

A. That contains the oil used in creating the flame.

Q. What is the object here that is like a funnel?

A. Well, it just protects the flame from spreading, you might say.

Q. Protect the flame from spreading.

A. That is about all it amounts to.

Mr. Pomeroy: I will offer Exhibit Number 1 in evidence.

The Court: What is the tray used for, if anything?

The Witness: The lamp usually is oily and sticky, and if you set it down it would spot up any furniture or clothing. I presume it is easily moved and set aside or hidden. It is pretty hard to handle that without getting your hands oily or black.

The Court: That is sufficient.

Mr. Onstad: At this time, your Honor, in order to [8] protect the record, I wish to object to the introduction of Plaintiff's Exhibit 1 on the ground and for the reason that the detective entered this room without a search warrant, without consideration of the constitutional rights of the defendant as set up under Article IV and Article V of the Constitution of the United States.

The Court: The matter has been passed upon previously and the Court makes the same ruling now.

Mr. Onstad: Very well. As I said I just did this for the purpose of the record.

The Court: Objection overruled.

(Testimony of Gilbert T. Belland.)

Mr. Onstad: An exception, if your Honor please.

The Court: Exception allowed.

The Court: The offer being now made, this exhibit, Plaintiff's Exhibit 1, is admitted in evidence.

(Scissors, hocks, funnel, lamp base and tray heretofore marked Plaintiff's Exhibit 1 for Identification was received in evidence.)

The Court: May I make this further inquiry in that connection: Who was present when that exhibit, and the articles making it up, was first taken or discovered?

The Witness: Federal Narcotic Inspector Walter [9] Graben is the agent who pulled the covers back and uncovered it.

The Court: Who was present in the room?

The Witness: Joe Goode, Harold Moodie,—I was outside of the doorway when this was uncovered.

The Court: Did you see it when it was uncovered?

The Witness: I didn't see it when it was uncovered.

The Court: The objection is sustained. The Court withdraws the ruling of admitting it at this time. I understood that he was present.

Were there any others present besides those named?

The Witness: I don't recall Giordano being in the room there at that time. He may have been.



(Testimony of Gilbert T. Belland.)

The Court: Can you think of anybody else that was present?

The Witness: Well, the defendant was present.

The Court: The ruling admitting Exhibit 1 is set aside and the objection sustained with leave to introduce further proof.

Mr. Pomeroy: If the Court please, the witness has said that the defendant was present in the room.

The Court: Apparently he was not present. [10]

Mr. Pomeroy: He was standing outside of the doorway of the room. She had called him out there. It is a very technical objection.

The Court: There may have been others who saw more clearly what took place than this witness.

The objection is sustained with leave to introduce further proof as to the identity and authenticity of this exhibit.

(Plaintiff's Exhibit 1 withdrawn.)

(Opium Pipe marked as Plaintiff's Exhibit 2 for Identification.)

By Mr. Pomeroy:

Q. (Continuing): You are being handed what is marked Plaintiff's Exhibit Number 2 for Identification. Will you state what that is, if you know.

A. It is a home-made opium pipe.

Q. Where did you see it first?

A. On the brass plate here, in the defendant's room. At that time it was laying at the head of her bed, where she had been sitting.

(Testimony of Gilbert T. Belland.)

Q. The brass tray you refer to is part of Plaintiff's Exhibit Number 1?

A. That is right; it was all there together.

Q. How long after you first saw it did you touch the [11] exhibit, Plaintiff's Exhibit Number 2?

A. I went over there immediately and examined it and felt of the pipe. It was hot. I took the lamp and went over to the wash bowl and emptied that so that it wouldn't run over anything.

Q. The lamp; do you mean the oil in it?

A. The oil can there.

Q. That is a part of Plaintiff's Exhibit Number 1? A. That is right.

Q. Plaintiff's Exhibit Number 2, you say you touched it and it was hot? A. That is right.

Q. Where was the defendant when you first saw Plaintiff's Exhibit Number 2?

A. The defendant and I were standing about six or eight inches,—right outside of the door—the doorstep there. She called me to the door and whispered to me about her mother. Then she hadn't any more than said it than we stepped in the door and here the inspector had uncovered it; then she just sort of gasped.

Mr. Pomeroy: I now offer Plaintiff's Exhibit number two in evidence.

Mr. Onstad: I object, your Honor, on the ground and for the reason that it has not been sufficiently identified here at this time. The testimony of the [12] officer was the first time that he went out of the room when it was found and that she was out-

(Testimony of Gilbert T. Belland.)

side of the room. Now he says that both he and the defendant were present. I think that the notes of the reporter will show that he first admitted he was outside of the room. Then later on, after the Court overruled the admission of Exhibit 1, he said that the defendant was present. I think the evidence is incompetent on that point.

Mr. Pomeroy: I submit, if the Court please, that it isn't in conflict at all. The story as told by the witness was that the defendant called him outside of the room and they were six or eight inches outside of the step. While they were there looking into the room, this evidence was discovered by federal inspector Graben of the Narcotic Service; that when they went back in the room he picked up this pipe. It was within the very proximity. When it was right exactly over the doorstep or six or eight inches outside it was in her presence. All of this evidence is admissible now I submit. It is only a question of time when I will have other officers on the stand who can testify further concerning the matter.

The Court: The Court will reserve ruling until I hear further testimony on the exhibit. [13]

(Jar of Opium marked Plaintiff's Exhibit 3 for Identification.)

By Mr. Pomeroy:

Q. You are being handed what has been marked for identification as Plaintiff's Exhibit Number 3 for identification; will you state what that is, if you know.

A. It is the porcelain jar that was standing on

(Testimony of Gilbert T. Belland.)

the tray with the other exhibits here at that particular time. I took the cover off and examined it, and it had a small quantity in the bottom which appeared to us at that time as opium.

Q. To be what? A. To be opium.

Q. Was that opium smoked?

A. It was prepared for smoking. It had not been smoked.

Mr. Pomeroy: I will offer Plaintiff's Exhibit Number 3.

Mr. Onstad: I make the same objection, if your Honor please.

The Court: The Court will reserve ruling until I hear the other testimony.

(Envelope containing Yen Shee marked Plaintiff's Exhibit 4 for Identification.) [14]

By Mr. Pomeroy:

Q. You are being handed what is marked for identification as Plaintiff's Exhibit Number 4; I will ask you to state what that is, if you know.

A. That is Yen Shee, which was also found on the tray at that time in the defendant's room.

Q. Tell the jury what Yen Shee is; what you mean by Yen Shee.

A. Yen Shee is the residue taken from the opium pipe here; scrapings that you would get from this pipe here on the inside. It is opium that has been smoked—the first scrapings are considered Number 1, and still considered good. They are used sometimes a second time.

(Testimony of Gilbert T. Belland.)

Q. In other words, Yen Shee can be smoked again, is that right? A. That is right.

Q. This pipe which is Plaintiff's Exhibit Number 2, is that a good pipe or is that the pipe usually used by opium smokers?

A. It is the pipe that is used by opium smokers in this day and age. They are unable to get the old pipes any more and they use these instead.

Mr. Pomeroy: I offer Plaintiff's Exhibit Number 4.

Mr. Onstad: The same objection. [15]

The Court: The Court will withhold ruling until further evidence is heard.

Mr. Pomeroy: You may inquire.

Cross Examination

By Mr. Onstad:

Q. Lieutenant Belland, I understood from your first statement here that Mrs. Johnson and yourself stepped out in the hallway; isn't that correct?

A. Yes. She called me to the door there.

Mr. Pomeroy: Will you speak up, please.

The Witness: I say she nodded to me. She wanted to talk to me and she went to the door. She stepped out ahead of me. We were out about six inches there and she told me—

Mr. Onstad: Q. Were you in the room at the time they found this or were you out in the hallway?

A. I was standing right in the hallway, about six inches from the door, with my back right in the door. She was out in front of me; facing me.



(Testimony of Gilbert T. Belland.)

Q. Is that the hallway or is that the room?

A. It would be in the hall about six inches away from the door; that would be in the big general hall.

Q. Which way did you say your back was turned? [16]

A. My back was right in the door, facing the room. She was in the hall talking to me.

Q. Was she in the hallway?

A. She was out in the hall, in front of me.

Q. In front of you? A. That is right.

Q. Yes. Was you face towards her?

A. I was facing towards her and she was facing toward me. She would naturally be facing toward the street or directly toward her room.

Q. Then your testimony is that you were in the room, is that correct?

A. No. I had been in the room previous to that. Her mother came in. When she saw her mother come in, she immediately jumped up and nodded to me and went for the door. I stepped to the door, stopping there about six inches right outside of the door. The door was open. Then she told me about wanting to come up with the stuff if I would get her mother out of there so her mother wouldn't be able to see it. She didn't want her mother to know anything about it.

Q. Didn't she tell you that her mother had nothing to do with this room whatever, isn't that what she said, and to leave her mother out of this?

A. She may have said something like that later on; not at [17] that particular time.

(Testimony of Gilbert T. Belland.)

Mr. Pomeroy: Let him finish.

Mr. Onstad: Were you finished, Officer?

A. She may have said something like that later on; I don't recall.

Mr. Onstad: Q. You wouldn't deny then to the Court and jury that the conversation she had with you outside was "leave my mother out of this, she has nothing to do with this whatever?"

A. No, there was nothing said about her mother having nothing to do with it out there. All she said then was to get her mother out of there so she wouldn't see it, because she didn't want her mother to know.

Q. If the conversation was different than what I have asked you, what was the exact conversation then?

A. I have explained—

Q. What was the exact conversation to the best of your ability? You were there and heard it; I wasn't there; you know what it was.

Mr. Pomeroy: I submit that that is argumentative, if the Court please.

The Court: The objection is overruled.

Mr. Onstad: Tell just what the conversation was you *proceeded* out of the room with Mrs. Johnson. [18]

A. As she got out of the room, she turned to me quickly—she said "get my mother out of the room quickly; I don't want her to know anything about this." She said, "I will come up with the opium."

Q. Where was it in the conversation that you

(Testimony of Gilbert T. Belland.)

were having with her when one of the men said that they found it?

A. What is that?

Q. Where was the conversation at the time—just where were you having the conversation, or where were you at the time the other officers found this tray in her bed?

A. It must have been right in the middle of it. It didn't take but two seconds for her to tell me that.

Q. A little while ago you said that the defendant was present at the time that that was found. How could the defendant be present under the circumstances you set up here; she is out in the hallway and you are standing in the door with your back to the place and is it not a fact that the bed was clear over to the south side of the room?

A. Well, the bed was about possibly five and a half or six feet from where she and I were standing. I don't know whether she noticed them uncover the bed or not.

Q. Just a little while ago you told the Court and jury that the defendant was present at the time it was found and that she saw it found. [19]

A. I may have misunderstood the question. I mean we were present there—we were no other place. We were present there. The door was open.

Q. Didn't you understand that when the exhibit was being offered in evidence here that the question was whether or not the defendant was there, and

(Testimony of Gilbert T. Belland.)

whether or not she actually saw the exhibits 1, 2, and 3 found?

A. She might have seen it uncovered. She was in a position where she could have seen it. I don't know.

Q. You say she was in a position where she could have seen it uncovered?

A. You see, she was standing facing the door there. Whether she looked by and seen it or not,—she certainly——

Q. You know very well, Officer, that that doorway there is just an ordinary doorway, and you said that you were standing in the doorway; and you know further that the bed was on the south side of the room, isn't that correct?

A. Over about three and a half feet.

Q. Yes. So she was outside in the hallway which you have testified to?

A. That is right.

Q. And you were in the doorway?

A. Yes. No,—I was just half in the door, about six inches away from the door. My back and shoulders might be [20] leaning right back in the door.

Q. Let me ask you if upon the 28th day of June, 1946, if you didn't make this affidavit: "The defendant went over and sat on her bed; several minutes later her mother entered the room. The defendant then arose and stepped into the hallway with me"? A. That is right.

Q. And you stepped into the hallway with her, isn't that a fact?

A. Yes, sir; I would call it the hallway.

(Testimony of Gilbert T. Belland.)

Q. And you were not there when the thing was found and you didn't see it and neither did she?

Mr. Pomeroy: I object to the form of question.

The Court: The objection is sustained. I believe it does contain too many questions in one.

Mr. Onstad: Q. Officer Belland, you testified that there was some Yen Shee found in the suit case?

The Court: Did you wish to ask him a question?

Mr. Onstad: Yes.

The Court: There is a question mark after that as I understand it.

A. It looked like the Yen Shee in the suit case was retained. I don't think it was. [21]

Q. You don't think any of it was retained?

A. I don't think so.

Q. Why?

Mr. Pomeroy: Will you keep your voice up, please?

A. I guess it would have been but after this other was recovered there was no necessity of keeping that.

Mr. Onstad: Q. Do you know how much Yen Shee was in the suit case?

A. I don't know; traces of it—shakings of it.

Q. How many grains is in that package that you identified here a few minutes ago?

A. I didn't weigh it. I understand it was around twenty-three grains or something—whatever it was.

Q. According to the charge in the indictment



(Testimony of Gilbert T. Belland.)

here, there was forty-one grains of Yen Shee; what happened to the other Yen Shee?

A. That could have been dissolved by chemical analysis. Chemists may explain that. There is always a little waste.

Q. Do you know what was done with the Yen Shee that was found in this suit case?

A. I don't know that that was retained.

Q. You were in there when the search first started, isn't that a fact? [22]

A. That is right. She was placed under arrest and the search started.

Q. Isn't it true that they first found the Yen Shee in this suit case?

A. There were traces of Yen Shee found there in that suit case.

Q. Did you look in that suit case yourself to find what was in there?

A. I just glanced over there. I could see dark traces of it. I didn't give it a personal examination other than just to glance at it.

Q. What else did you see in the suit case?

A. Well, I just noticed there was clothing in there. I didn't pay any attention to whether it was men's clothing, women's clothing, or what.

Q. Didn't you look in that suit case to see whether there was opium in that suit case?

A. I didn't make that inspection. The agents did that. I was busy talking to the defendant most of the time.

(Testimony of Gilbert T. Belland.)

Q. You didn't do any searching at all then, is that correct?

A. No; I explained to her that if she had anything, it would be nicer for her to come up with it because it would save us just tearing things apart.

Q. Did you take an active participation in this search or [23] not?

A. Other than just observing.

The Court: Do you mean not otherwise than observation?

Mr. Onstad: Q. You just stood there and talked to her?

A. It stood there and made observation. I noticed that when one of the agents called our attention to it. I think it was Agent Giordano who called the boys' attention that there was Yen Shee in that suit case there, traces of it.

Q. How big would you say this room would be?

A. Well, it is not a very big room. It looked to be about maybe 9 by 9 or something like that or 9 by 10.

Q. There wasn't very much standing room in the room, was there?

A. No; it was a little three-quarter bed she had over in the corner there. It took up better than a fourth, or about a fourth of the room practically.

Q. Did you notice the kittens in there, too?

A. Yes, I believe there was some little kittens in there.

Q. How long was it after you noticed the boys

(Testimony of Gilbert T. Belland.)

showing you the Yen Shee in the suit case that Exhibits 1, 2 and 3 were found? [24]

A. Well, I don't imagine it was over a minute or two. Everything happened pretty fast there. Her mother came in and then she just got that statement over to me.

Q. In your opinion, how long was it from the time that you entered her room until the time that these exhibits were found in her bed; how much time elapsed?

A. Oh, maybe five minutes to eight minutes at the most.

Q. Do you recall one of the other officers bringing in another roomer there by the name of Kay Doran, and placing her under arrest?

A. I know there was a young lady come in the room there.

Q. Did you hear any conversation that she had with the officers at all?

A. I don't recall any now.

Q. You recall, though, the officer brought her in the room?

A. I don't know who brought her in.

Q. Did you ask her any questions at all?

A. Yes. I recall asking her who she was and where she roomed. It seemed that she had the room right at the head of the stairs to the left; just as you get to the head of the stairs. The room was apparently one facing to the left in the hall.

Q. Did you ask her if she smelled anything there?

(Testimony of Gilbert T. Belland.)

A. I may have asked her about that. [25]

Q. Do you remember her telling you that she couldn't smell anything there that they had burned incense there to keep down the smell of these cats?

A. I don't deny that. There may have been something said about incense. I don't deny that.

Q. Who was the informer who told you about opium being up at the Europe Hotel?

Mr. Pomeroy:: I object to that if the Court please on the grounds of its being incompetent, irrelevant, and immaterial and not proper cross-examination.

Mr. Onstad: He testified he got it from a confidential informer. I should think I would be entitled to know the name.

The Court: The objection is overruled. If he knows the name he can state it.

Mr. Onstad:: Q. What was the name of the informer who gave you this information?

A. I don't just understand his questions.

The Court: Will you read the question, Mr. Reporter?

(The reporter read the question as follows:

“Q. What was the name of the informer who gave you this information?”)

A. You mean that night? [25]

Q. (By Mr. Onstad) Well, any night; any information that was given you about the hotel—that is what I am interested in—knowing the truth; what happened?

(Testimony of Gilbert T. Belland.)

Mr. Pomeroy: I object to that, if the Court please, as improper form and not being specific.

The Court: The objection is overruled.

Q. (By Mr. Onstad) Answer the first question. My question is: give me the name of the informer who told you that there was opium being smoked at the Europe Hotel.

A. A man by the name of Odekirk.

Q. How do you spell his last name?

A. O-d-e-k-i-r-k.

Q. Where did this conversation take place?

A. In my automobile.

Q. When and where; give me the circumstances.

A. Near the Oxford Hotel.

Q. Where is that located?

A. About a block this side—a block south of the—

Q. What did he tell you about it; what did he know about the place?

Mr. Pomeroy: I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: The objection is overruled. [27]

Q. (By Mr. Onstad) What did he tell you about the place; what did he know about it?

A. He just said that he came up there and the place was reeking with opium smoke; that someone was smoking up there at that time. He didn't know where or whose room it was.

Q. Did you ask him where he had been in the



(Testimony of Gilbert T. Belland.)

hotel, whether it was on the first, second, or third floor?

A. No. I took him up there for the purpose of interviewing the management of that hotel to find out if they would tell him, or who in that hotel was a user of opium or might be smoking opium. I saw him enter the hotel. He couldn't any more than have got up to the head of the stairs when he came right down again. He started walking up the street and I picked him up again.

Q. You first talked to him at what time?

A. I met him at 7:30.

Q. And then you had this conversation with him, is that correct?

A. I had a conversation with him about going up there to the Europe Hotel and he indicated he knew the management of that hotel. I asked him to go up there and try to contact the management and find out, if he could, who her tenants were that might be suspected of using opium. [28]

Q. You said he was familiar with the management of the hotel.

A. He said—

Q. He knew?

A. He indicated to me that he knew the manager of that hotel.

Q. He didn't tell you that he suspected her?

A. No, he didn't. I think it was as much a surprise to him as it was to me.

Q. Lieutenant Belland, I am just a little stunned this morning about some of these things—maybe I

(Testimony of Gilbert T. Belland.)

have got too much on my mind. Anyway, you say it was at 7:30 that you met him?

A. I met him at 7:30, yes, at his place of business.

Q. At his what?

A. At his place of—or I met him down at Fourth and Cherry at 7:30 by appointment. I had called him by phone. I came out on the street and we met him and drove right up to this hotel.

Q. I am sorry Lieutenant Belland. I don't seem to quite understand these things. Now, you say you met him at his place of business near Fourth & Cherry. A little while ago you told me that you met him near the Oxford Hotel at about 7:30, a block south; now which is the truth—it was at Fourth and Cherry or outside of the [29] Oxford Hotel.

A. I picked him up at Fourth & Cherry and we drove up to this Europe Hotel. I let him out and I saw him heading toward the Europe Hotel. He went up the stairs and came back out and I picked him up. We drove right back to Fourth and Cherry and I let him out. I drove then to Sixth and Jackson Street where I contacted the Federal Narcotic Agents.

Q. Your testimony was first that you met these men at 7:40; did you meet the Narcotic Officers at 7:40?

A. I figured it was about 7:40, about 10 minutes to 8:00.

Q. As far as this informer was concerned, he

(Testimony of Gilbert T. Belland.)

didn't know then where any smoke was coming from in the hotel or any room number or anything else, is that correct?

A. He didn't know. He just said there was someone in that room—someone in that hotel up there that was smoking because he could smell it right in the hallway and he came right down.

Q. Did he give you the name of the manager of the hotel?

A. He had mentioned her name as Anne Dwyer, that he would go up and have a talk with her, and he thought that if she would indicate to him the names of anyone that might be suspected, that were tenants of hers, that could be smoking opium.

Q. Did you know Solomon B. Zissu? [30]

The Court: At this point we are about to take a short recess.

The jury is instructed not to discuss this case at this time when absent from the jury box and at no other time during the progress of the trial when you are absent from the jury box.

Do not discuss it with anyone and do not permit anyone to discuss it with you.

Avoid all contacts with strangers and with counsel in the case and witnesses and parties.

Remember and heed this admonition at all times during the progress of the trial.

You may temporarily retire to the jury room for ten minutes.

Court will be in recess for that length of time.

(Recess.)

(Testimony of Gilbert T. Belland.)

The Court: Let the record show all of the jury returned to their places as before and that all parties are present with their counsel.

You may proceed.

Q. (By Mr. Onstad) Officer Belland, you have a thorough knowledge of narcotic addicts and narcotics and their [31] users, don't you?

A. Somewhat of a knowledge.

Q. Just somewhat?

A. I have had experience since 1934.

Q. Is your knowledge "somewhat" or is it thorough?

Mr. Pomeroy: I object to that, if the Court please, as calling for a conclusion.

The Court: The objection is overruled. He used the word "somewhat" himself and I think Counsel is entitled to have the reference further clarified.

Q. (By Mr. Onstad) You just testified in response to the question I asked you and you said that you have a "somewhat" knowledge; didn't you on the 28th of June, 1946, state this in an affidavit:

"Gilbert T. Belland, being first duly sworn, on oath deposes and says: That he is a Lieutenant Detective of the Seattle Police Department assigned to the narcotic detail, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

"That I have been a member of the narcotic detail of the Seattle Police Department since 1934,

(Testimony of Gilbert T. Belland.)

and have a thorough knowledge of narcotics [32] and their use, and narcotic addicts."

A. Yes, I made that affidavit.

Q. But this morning on the stand you just have a "somewhat" knowledge, is that right?

A. It depends on just what you mean. I feel that I have a—

Q. On this Exhibit 1, that counsel for the Government has introduced here,—and using this pipe which is an exhibit—I don't know—but you have it there; how long would a person smoke that pipe?

A. You say how long what?

Q. How long would an ordinary person smoke if they started using that outfit; would you demonstrate to the Court and jury how it is used; how it is operated.

A. Well, they get their flame going and take one of those yen hocks and dip it into the opium prepared for smoking, hold it over the lamp and then insert it into the hole in that pipe and drag on it.

Q. How many times would they do that?

A. It depends on how many of those little pills, as they call it, they would smoke. They might smoke for fifteen or twenty minutes or they might smoke for an hour.

Q. They just keep filling the pipe, is that the way they do it? [33]

A. A little bit at the time, yes; they sometimes speak about smoking one pill or two pills or more.



(Testimony of Gilbert T. Belland.)

It depends upon whether you are a heavy smoker or just someone who is a light smoker.

Q. How long would you say that the heavy smoker would smoke?

A. I have talked with what are considered heavy smokers, and they will smoke for about an hour or so.

Q. That would be about the longest?

A. Well, they don't usually smoke longer than that.

Q. Let's see what happened here, in checking the time. You said that at about 7:30 you met this Odekirk near the Oxford Hotel in your car, and then you had a conversation with him.

A. I picked him up at 7:30 and drove right up there and let him out.

Q. Yes. And you stopped in front of the Oxford Hotel?

A. Within a block.

Q. I mean approximately.

A. Yes, that is right.

Q. That is about a block away from the Europe Hotel, is that right?

A. Well,—

Q. You picked him up at Fourth and Cherry?

A. Yes, that is approximately right. [34]

Q. He owns the Trenton Arms, does he not? He is a hotel owner?

Mr. Pomeroy: That is objected to, your Honor. The Government does not have to disclose its informers, unless that informer has a direct bearing upon the case in a case of purchase or something of that nature. All it does in opening up a case

(Testimony of Gilbert T. Belland.)

like this is to put all Government informers on a spot, if the Court please.

The Court: I didn't know before your present reference that it was claimed that Mr. Belland's informer was a Government informer.

I understood Mr. Belland worked for the City Police Department and not for the Federal Government. That was in my mind at the time I made the ruling upon this matter.

Mr. Pomeroy: If the Court please, in all cases brought in Federal Courts this man has been an officer connected with the Federal Narcotic Service. All of his activities are under the direction of the Federal Narcotic Service when he works with them.

The Court: There is no proof of that fact before the Court. There is no legal conclusion which the Court is required to draw to that effect in the absence of proof. You may proceed. [35]

Mr. Onstad: Q. You did say that you picked him up at his place of business?

A. Yes; I met him on the street there.

Q. His place of business is a hotel, is it not?

Mr. Pomeroy: I object on the same ground. May I ask him that question now as to whether or not he was acting under the Federal Narcotics Division?

Mr. Onstad: I have no objection to that.

The Court: You may do so.

Mr. Pomeroy: In this case, and under the circumstances surrounding this case, were you acting

(Testimony of Gilbert T. Belland.)

under the supervision of the Federal Narcotics Service?

The Witness: Yes, sir.

Mr. Onstad: May I ask a couple of questions if your Honor please?

The Court: You may, if Mr. Pomeroy is finished. Are you finished, Mr. Pomeroy?

Mr. Pomeroy: That is all.

Mr. Onstad: Q. Isn't it a fact, Mr. Belland, that you stated in your examination that you picked him up at his place of business and drove him up there and he went up in the hotel and that you drove back to his place of business and let him off and you went out and got the Narcotic Officers to go up on this case? [36] A. That is right.

Q. Well, how could he be acting under the direction of the Narcotics Bureau when he did all of the preliminary work himself and it was his case and he got the officers to assist him?

A. They knew I was going to contact him, before they went down on their case; my duty was to go and contact Odekirk.

Mr. Pomeroy: I may ask one more, now, if you want to get further into it.

The Court: Address your questions and remarks to the Court.

Mr. Onstad: All I know is what is before the Court and jury here.

The Court: That is one reason the Court makes the present suggestion.

Mr. Pomeroy: May I ask another question?

(Testimony of Gilbert T. Belland.)

The Court: You may do so.

Mr. Pomeroy: In making this investigation, is it not true that an investigation was made on a large shipment of opium which was brought into this territory; you in conjunction with the Federal Narcotics Service?

The Witness: That is correct.

Mr. Pomeroy: And this is a part of that examination, is that correct? [37]

The Witness: That is correct.

Mr. Onstad: All right.

Mr. Onstad: Q. Is Odekirk in the employ of the Federal Government?

Mr. Pomeroy: I object to that, if the Court please, as incompetent, irrelevant and immaterial.

Mr. Onstad: That is what he is trying to prove here.

The Court: The objection is overruled.

Mr. Pomeroy: If he knows.

The Court: He should have that condition.

Mr. Onstad: Q. Is Odekirk an employee of the Federal Government?

A. I would say that he is cooperative with them. I don't know as to just about his being a paid employee.

Q. Is he being paid? A. No.

Q. Has he made any claim upon the Government for half of the fines which have been imposed in any cases that he has turned in to your knowledge?

A. I don't know about that, sir.



(Testimony of Gilbert T. Belland.)

Q. What consideration does he get for cooperating with you and the Federal Narcotics Division?

A. I can't answer that.

Q. Is Odekirk a narcotic user?

A. He is.

Q. How long have you known Mr. Odekirk?

A. Seven or eight months.

Q. During that time has he been at any time under the influence of narcotics when you have talked to him?

A. I know he has a prescription from a physician and is a user of narcotics.

Q. He can get it on a prescription?

A. Yes.

Q. Did your Department, or the Federal Narcotics Bureau, of your own knowledge, assist him in getting that prescription? A. No, sir.

Q. Can anybody get prescription for the use of narcotics?

Mr. Pomeroy: I object to that, if the Court please, on the ground it is incompetent, irrelevant, and immaterial and not proper cross-examination.

The Court: The objection is overruled.

Mr. Onstad: Will you answer that question?

A. They have to satisfy the physician of their ailment. And if after a thorough examination the physician feels that his patient is justified in having it, it is his prerogative to issue a prescription for that purpose if [39] he so desires.

Mr. Onstad: Q. Can a physician prescribe opium to be smoked?



(Testimony of Gilbert T. Belland.)

A. I don't know where he would get it filled.

Q. They can prescribe narcotics, but you don't know about the opium, is that right? A. No.

Q. You don't know about the opium?

A. No.

Q. What consideration do you give Odekirk for giving you this information?

A. I don't know. If any, that would be through the District Supervisor and the District Attorney's Office.

Q. In other words, if he got any pay he got it from the District Attorney or from the Narcotic Bureau, is that correct?

A. That would be my impression.

Q. Did you know that anybody who turned in a person who was convicted and fined for the possession, purchase, or sale or otherwise of narcotics was entitled to half of the fine; did you know that?

A. I understood there was a custom or law to that effect.

Q. You understood it? A. Yes. [40]

Q. Have you ever made the statement to any of these informers that if they turn in anybody and they are caught that they will get half of the fine the Court imposes?

A. I never use that.

Q. You never use that. A. That is right.

Q. You don't know whether the Federals do; did they ever do it in your presence?

A. Not to my knowledge.

Q. Going back to this testimony where you said

(Testimony of Gilbert T. Belland.)

that the light users smoke for fifteen or twenty minutes and one hour for heavy users.

As I understood your testimony you met this man at 7:30, and you drove to the Oxford Hotel.

A. In the vicinity of the Oxford Hotel.

Q. Then he got out of the car and walked a block up to the Europe Hotel or approximately a block and that he went upstairs and looked around and came back and told you that he could smell opium there, is that correct?

A. He could smell opium; someone was smoking in that building there at that time.

Q. Someone was smoking at that time?

A. That is right.

Q. Then he came back to the car which was way up near First [41] Avenue and Virginia Street?

A. We went up in that building there. I drove to the corner below and turned around and parked on the other side of the street. I seen him coming right out and I slowly went up the street and followed him. When we got up towards the Oxford Hotel, he got in the car again.

Q. Then you drove from there back to his place of business? A. That is right.

Q. What time did you arrive back at his place of business?

A. Well, I figured it was around a quarter to 6:00, approximately.

Q. In other words, you were only gone about fifteen minutes then, is that correct, from the time you picked him up, up there and back again?

(Testimony of Gilbert T. Belland.)

A. That is right.

Q. Then you drove from there to somewhere down on Jackson Street, is that right?

A. Sixth and Jackson Street.

Q. What? A. Between—

Q. Sixth and Jackson?

A. In that vicinity, that is right.

Q. How long after you arrived down there was it that you got in touch with the Federal Narcotics Bureau Agents? [42]

A. I got in touch with them instantly. They were parked right there and I observed what was going on at that time.

Q. How long did you stay down there?

A. I was there about five minutes.

Q. Then what happened?

A. We searched the defendant, and took him up to the City Jail and booked him, and then we proceeded right up to the Europe Hotel.

Q. How long did it take at the Police Station to book this man?

A. Oh, just the usual time.

Q. What is the usual time?

A. Well, I don't think we were in that Police Station—not exceeding fifteen minutes.

Q. Tell us what you did after you parked your car in front of the Police Station, where you parked your car, and how you got out and what you did.

A. We went up to my office and continued searching—to check some money, marked money

(Testimony of Gilbert T. Belland.)

on him, and then I took him down and booked him.

Q. Then where were the Narcotic Agents at that time? A. They were with me.

Q. They were with you at the time?

A. Well, we were all together. [43]

Q. How many were there altogether?

A. Harold Moodie, Joe Goode, Giordano, and Walter Graben.

Q. Four of them, is that right?

A. That is right.

Q. Where did you park your car and where did they park their car?

A. Usually in the parking lot right on Terry Street there. I had my own private parking space across from the jail.

Q. And then you walked into the jail.

A. That is right.

Q. How long did you talk to the defendant in your office that day?

A. I didn't do much talking to that fellow.

Q. What time did you leave the Police Station?

A. I would say it was before 8:30, about 8:25 possibly.

Q. So about an hour had elapsed from the time that you had picked this man up until the time you left the police station?

A. Well I think it was a little short of an hour.

Q. You said about 8:25 a little while ago.

A. Approximately.

Q. I am not asking for the exact minute. You



(Testimony of Gilbert T. Belland.)

know how long it took you. Then from there you had to walk to the Police Station and get your car and drive to [44] the Europe Hotel is that right?

A. That is right.

Q. All through the traffic uptown, about 8:30 at night?

A. Yes.

Q. What time did you arrive at the Europe Hotel?

A. I thought it was along about twenty minutes or a quarter to 9:00.

Q. In the vicinity of about 9:00 o'clock, isn't that right?

A. Well,—

Q. Where did you park your car before you got out to search the Europe Hotel?

A. We parked it right north of the hotel.

Q. Did you have any difficulty finding a place to park?

A. Not at that time of the night, you don't.

Q. Then you got out of your car all of you and went up to the doorway of the Europe Hotel, is that correct?

A. That is right.

Q. And the two of you went upstairs?

A. That is right.

Q. So then it would be about an hour and a half from the time you were first there until the time that you were back, approximately?

A. Well, I don't think it was over about an hour and fifteen minutes or an hour and ten minutes.

Q. You don't know how long someone had been smoking opium [45] before Odekirk had been into the hotel, do you?



(Testimony of Gilbert T. Belland.)

A. I have no idea how long they could have been smoking there previous to the time that he—

Q. According to the testimony there was a lot of opium around the hall that he could smell; someone must have been smoking opium.

A. That is right.

Q. How long does it take for the fumes to go away?

A. It doesn't take long for the fumes to spread in the hallway and settle down; it settles down and goes low on the ground.

Q. It goes down rather than up, is that correct?

A. That is right.

Q. If the window was open on the First Avenue side, about eighteen or twenty feet above the entrance-way of the hotel there, do you think you could have smelled opium down there?

A. I thought there was a sort of a draft from the front there; and with the windows closed at that height there, you may not have been able to smell it on the outside but as we approached the door, there is usually a sort of a draft coming through between the sill and the door, and it was coming through there with a slight force—it was coming through there pretty strong. Our nose just led us right up to the crack of that door. [46]

Q. If you opened the door, wouldn't the draft go in rather than out, usually—when you open the door—doesn't the air rush in—inside?

A. That might be true; but that wouldn't cause

(Testimony of Gilbert T. Belland.)

any smoke to go through the glass pane down onto the street where people outside could smell it.

Q. You testified at the time you came up there, there was smoke still coming out of this door?

A. That is right; there was an opium odor coming out through that door very strong.

Q. How long would this odor remain in a room after somebody smoked in a room—one person let's say.

A. It would remain quite a while. It would saturate the curtains; there is a stench around there that is pretty hard to get rid of.

Q. Would it stay there for a long time?

A. That is right.

Q. How long would the opium smell remain after a person had been smoking there say for an hour?

A. Oh, you might notice it there several hours afterwards.

Q. In other words, the smoke would remain there for quite a long time, sufficient for a person to smell it, is that correct?

A. That would depend upon the kind of ventilation that was applied to the room. If they used that incense [47] to kill it, or whatever they may have wanted to apply to do away with the odor of opium smoking.

Q. Then can do away with it by applying ventilation, is that correct?

A. They can certainly even it up.

Q. Then if the door was more or less left ajar,

(Testimony of Gilbert T. Belland.)

and the window open, in a small room and a person smoking there do you think any opium would ever get out in the hallway?

A. That is not a very close fitting door. It is just old-fashioned buildings there and there is just a lot of place for draft.

Q. This door was a pretty dilapidated door, wasn't it, as you recall it?

A. That is right.

Q. Do you remember that the lower panel was very loose and you could almost push it in?

A. I didn't notice that. I just touched the door-nob and rapped on the door.

Q. Did you see what all these exhibits were found in; were they found just like that or how were they found?

A. Well, they were all there on the platter on the bed there. Of course, they didn't have those tags on them at that time.

Q. Was it opened just like that when they found it? [48]

A. Well, it was approximately like that, only that can had oil in it. I emptied that.

Q. It was not in any kind of a container or anything like that?

A. No; it was right there on the tray.

Q. Did you see them actually find it—turn back the covers and find it?

A. I heard the shout and noise. Both her and I stepped in at that instance. She just gasped when she realized that that had been discovered.

(Testimony of Gilbert T. Belland.)

Q. Isn't it a fact that that was all enclosed in a brown paper sack?

A. Not when I saw it. It was just like that.

Q. ~~Just like that, when you saw it.~~

A. That is correct.

Q. If it was found in a sack you don't know about it?

A. If there was a sack there it was removed. That is the way it looked there, to me.

Q. As far as you know it wasn't found there in a sack; that is your best recollection, is that a fact?

A. I don't know anything about a brown sack.

Q. Could it have been in a brown sack?

A. I don't know how it could have been.

Q. You don't know how it could have been; if someone found it in a brown sack and you didn't see it until after it [49] had been taken out of the sack, you wouldn't know about it?

A. If someone—I don't see how anyone could do away with the sack in that period of time.

Q. Do you know Solomon B. Zissu?

Mr. Pomeroy: Objected to as incompetent, irrelevant, and immaterial and improper cross-examination.

The Court: Was anything asked about him?

Mr. Onstad: I just asked him if he knew him. This is preliminary, your Honor.

The Court: It seems to me the objection ought to be sustained.

Mr. Onstad: Very well.

The Court: And that is the ruling of the Court.

(Testimony of Gilbert T. Belland.)

Mr. Onstad: Will you mark that as Defendant's Exhibit 1, please.

~~(Ration Book—Solomon Z. Zissu,—marked~~  
Defendant's Exhibit A-1 for Identification.)

By Mr. Onstad:

Q. Showing you what is marked as Defendant's Exhibit A-1 for identification, a War Ration Book having the name of Solomon B. Zissu on it, I will ask you to state whether or not you saw that in the suit case that night in the defendant's apartment?

A. This is the first time that I have ever seen this here [50] in my life.

Q. Do you recall Mrs. Johnson in your presence and in the presence of another narcotic agent in your office after she was arrested around 10:00 or 11:00 o'clock that night saying, "You know this isn't yours. Now tell us who it belongs to." And she stated, "The man this belongs to is worse off than I am." Did you have this conversation with her?

A. I don't recall that. We may have said something like that. I know I tried to question her but she sat tight.

Q. She said she wouldn't be a stool pigeon on a sick man, isn't that right?

A. I don't recall those exact words but I know she didn't want to do any talking.

Q. She told you that this man this belonged to was much worse off than she was, isn't that true?

A. I don't recall her making any statement of that kind; she may have. She did indicate that the



(Testimony of Gilbert T. Belland.)

stuff didn't belong to her; the only time—up at the door she said she would come up with the opium. But after that, why, she wanted to lead me to believe that the stuff really wasn't hers—that it actually belonged to someone else; but she wouldn't give me anything definite.

Q. You say you never saw that ration book there that night [51] at all?

A. No. I just glanced at that suit case. I didn't make an inspection.

Q. Do you know this Solomon B. Zissu?

Mr. Pomeroy: The same objection.

The Court: Sustained.

Mr. Onstad: I may want to question the witness at a later time. That is all for now.

### Redirect Examination

By Mr. Pomeroy:

Q. Can you describe the smell of smoking opium?

A. It is rather a sweet, sickening smell or odor. Once you have smelled it you don't confuse it with any other smell. You just recognize it when you smell it again.

Q. And on this particular evening you did smell smoking opium?

A. As we had gone,—

The Court: Answer the question directly. Read the question, Mr. Reporter.

(The reporter read the question as above recorded.)

(Testimony of Gilbert T. Belland.)

A. Yes, sir.

Mr. Pomeroy: That is all. You may step down.

The Court: You may step down. Will you [52] remain in attendance until later excused, Mr. Belland?

The Witness: Yes, sir.

(Witness excused.)

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JOSEPH E. GOODE

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Joseph E. Goode.

Q. What is your occupation?

A. Federal Narcotic Agent.

Q. How long have you been employed by the Federal Government?

A. Twenty-two years.

Q. Directing your attention to the night of April 8th, did you see the Defendant Anne Johnson?

A. I did.

Q. Where did you see her?

A. At the hotel on First Avenue.

Q. The Europe Hotel? [53]

A. The Europe Hotel, yes.

(Testimony of Joseph E. Goode.)

Q. Describe what you did and what you saw when you first arrived at the Europe Hotel.

A. When I first arrived at the Europe Hotel, I stayed outside while Detective Belland and Giordano went upstairs. After a few minutes Giordano came back and said, come on upstairs that they smelled opium in the front room on the second floor.

Q. Then what did you do?

A. Inspector Graben and I walked on up to the second floor, where Mr. Belland was.

Q. What other officers were there with you at that time?

A. Lieutenant Belland and myself, Giordano, Graben, and Moodie were all there. Moodie didn't go upstairs. He stayed outside in front.

Q. You went upstairs with Graben, is that right?

A. Yes, sir.

Q. What did you find when you went upstairs?

A. When I first got upstairs, I could smell smoking opium very strong. Mr. Belland was standing in front of Door Number 1. When I got up close to this door, there was a very strong odor of opium coming out of this room. Mr. Belland knocked on the door. Someone inside asked "Who is it?" Detective Belland said, "Lieutenant Belland, Detective." She said, "Wait a [54] minute. A few seconds after that, when it didn't open, he knocked again. Then she said, "Just a minute." Then she opened the door.

Mr. Belland and I walked in, and Mr. Graben—Inspector Graben was right behind us.

(Testimony of Joseph E. Goode.)

Q. After you arrived in the room, what occurred then?

A. The first thing after she opened the door, she sat right down on the bed—the edge of the bed. Then Mr. Giordano came in. He was at the fire escape watching. He came in and started searching, after Lieutenant Belland placed her under arrest and said he was going to search. Mr. Graben searched through the room. He searched through a suit case at the foot of the bed, to the right of it. In a few minutes he said he saw some traces of Yen Shee in the suit case.

I walked over to the suit case and kept on going down through the suit case to the bottom.

Just a few grains would roll down. We went all of the way down to the bottom of the suit case. There wasn't enough stuff you could recover there at that time.

About that time Mr. Belland and the defendant walked outside, just outside of the door—the door was open. After she got off of the bed I turned around— [55] Inspector Graben turned the cover back. When he did, this tray was right under the cover.

Q. By "this tray" you are pointing to a part of Plaintiff's Exhibit Number 1, is that correct?

A. Yes.

Q. Directing your attention now to Exhibits 1, 2, 3, and 4, have you seen those before?

A. Yes, sir.

Q. Where did you see them first?

(Testimony of Joseph E. Goode.)

A. I saw them when Mr. Graben pulled the covers back off of the bed where she had been sitting and this was on the tray like this. This Yen Shee was loose on the tray.

Q. The Yen Shee which is now in the envelope was loose on the tray, is that correct?

A. Yes.

Q. Did you see the pipe there?

A. Yes, sir.

Q. What condition was the pipe in when you saw it?

A. Very warm the pipe was when I touched it—just like that.

Q. How long does it take a pipe to cool off, after it has been heated up by smoke?

A. A glass pipe like that, it don't take it but a few minutes—ten or fifteen minutes or less. [56]

Q. To cool off? A. Yes, sir.

Q. How hot do those pipes get?

A. They get—well, they get, not like you would call hot but real warm. You might call it hot, but you could handle it with your hands.

Q. Does it depend upon the smoker as to how hot the pipe is? A. Yes.

Q. What is the difference as to the type of smoker, between one and another as to how hot the pipe gets?

A. The longer you would smoke it, the hotter it would get.

Q. The rapidity with which you puff the opium, does that have anything to do with it?



(Testimony of Joseph E. Goode.)

A. Yes, sir.

Q. What does that have to do with it?

A. The more flame you draw in there, naturally it gets hotter faster.

Q. How long before you touch the pipe would you say it had been used on that particular night?

A. I would say less than fifteen minutes—less than ten minutes.

Q. Less than ten minutes? A. Yes, sir.

Q. What occurred after the covers were pulled back and this [57] tray and Exhibits 1, 2, 3, and 4 came into view, what occurred then?

The Court: At that very instant what occurred, who was present?

The Witness: Myself, Detective Belland was just outside of the door looking in—I think he was. He was in the door,—I don't know. Inspector Graben was the one who turned the covers back when he said, "Here it is." Giordano was by the end of the bed. He walked over. That was all in the room at that time. The mother was in the room, too.

Mr. Pomeroy: Q. That was the defendant's mother? A. Yes, sir.

Q. Where was the defendant?

A. She was right at the door; just outside of the door.

Q. Did you talk with the defendant at all?

A. No, sir; I did not.

Mr. Pomeroy: You may inquire.

(Testimony of Joseph E. Goode.)

Cross Examination

By Mr. Onstad:

Q. You didn't find those articles, is that correct?

A. Those; I didn't turn the cover back when they first came in view. [58]

Q. Did you see them when they were found?

A. Yes, sir.

Q. Were they in the paper sack?

A. No, sir.

Q. They were just like that, is that right?

A. They were on this tray; this might have been down and the cover was back a little bit.

Q. Had she been sitting on those things?

A. No; on the edge of the bed. It was just to the outside of where she had been sitting, where the covers were.

Q. Isn't it true they were actually sitting on them? A. No, sir.

Q. How long were you there before those things were found?

A. About six or seven minutes.

Q. Who was it that placed Kay Doran and the second girl that came into the hall under arrest?

A. What was that question?

Q. Did you place a girl by the name of Kay Doran under arrest?

A. No, she wasn't placed under arrest. She came into the room to see what was going on.

Q. She wasn't lead into the room by one of you by the arm? A. No, sir.

(Testimony of Joseph E. Goode.)

Q. What was the name of the man that brought her into the room? [59]

A. She,—no one brought her in. She walked in by herself. She wanted to see what the trouble was.

Q. How long was she in the room before the defendant's mother came into the room?

A. About a minute or two minutes.

Q. Did you have any conversation with her?

A. No, sir.

Q. Not at all? A. Not very much.

Q. Was the pipe the only thing that was hot there?

A. That was the only thing that I felt that was hot there.

Q. As far as anything else that was there, it wasn't hot?

A. I don't know what you mean. I didn't feel of anything else except the pipe, and searching the suit case when she was there.

Q. Did you search the suit case?

A. I assisted. I was right there when Giordano was looking through it.

Q. How much Yen Shee was found in the suit case?

A. It wasn't much—just a crumb like this and it rolled down.

Q. Are you familiar with that Yen Shee which is in the envelope marked Government's Exhibit 4?

A. Yes, sir.

Q. You say it was on the tray loose. [60]

A. Yes, it was on the tray loose.

(Testimony of Joseph E. Goode.)

Q. How many grains are in that envelope at the present time?

A. I don't know. It was weighed by Inspector Graben and sent to the Chemist.

Q. Were you there in Lieutenant Belland's office and had a conversation with the defendant after she was taken to jail?

A. No, sir.

Q. You don't know what happened?

A. No.

Q. You say Moodie was left outside.

A. He was left outside—yes, sir; he was.

Q. Did he have anything to do with the search at all?

A. He came up later but he didn't assist in the search, no, sir.

Q. Do you recall that night of Lieutenant Belland meeting you on Sixth and Jackson, is that correct?

A. I do.

Q. What time do you think it was?

A. I don't know, we had just made an arrest of a purchaser of some narcotics. When he drove up, I would say it was close to 8:00 o'clock to the best of my recollection.

Q. You went with him to the Police Station and booked that man, is that right? [61].

A. Yes, sir.

Q. And then you went up to the Europe Hotel?

A. That is right.

Q. And parked up there?

A. Yes.

Q. You said you stayed downstairs at first, is that right, and then went upstairs later on?

(Testimony of Joseph E. Goode.)

A. Yes, sir.

Q. Where were all of these exhibits the first time you saw them; who had hold of those exhibits?

A. When I first saw them, Mr. Graben had turned the covers back and they were laying on the bed.

Q. You saw them laying on the bed, is that right?

A. Yes.

Q. What did you do then?

A. Mr. Graben pulled them over and started to look in the jar; took this bottle of—took this and this lamp here,—this bottle for the lamp; it was full of olive oil. I noticed Mr. Graben took it to the sink and poured it out. That is all I think I did with it there at that time.

Q. How long did you stay there after you found that paraphernalia?

A. Well, about ten or fifteen minutes.

Q. You searched further after that, did you?

A. No, sir, there was very little search made after that. I did it myself,—some of the other agents went out.

Q. Did you have any other conversation with Odekirk that you can recall?

A. No, sir.

Q. So as far as what information he gave in this case, you know nothing about that?

A. No, sir.

Mr. Pomeroy: I object to that, if the Court please, as improper cross-examination.

The Court: I think that should be sustained.



(Testimony of Joseph E. Goode.)

Mr. Onstad: I asked him if he had any conversations with Odekirk at all in this case.

The Court: That is sustained.

Mr. Onstad: As I understood a little while ago the Government was trying to show that Odekirk was not an employee of the Government. I was asking the defendant.

Mr. Pomeroy: I object to that statement, if the Court please. There was never any comment about his being an employee of the Government.

The Court: The objection is sustained. The Court's ruling will stand. Proceed.

Mr. Onstad: Q. This room is a very small room, isn't [63] that correct?

A. Yes; it is a small room.

Q. You noticed the cats in there?

A. I did.

Q. Did you hear Kay Loran in your presence state that incense was always burned there in the hotel to keep down the aroma from the cats?

A. No, sir, I did not.

Q. Did you see the incense burner on the dresser there?

A. I don't think I recall one on it.

Q. Did you look in the suit case yourself?

A. Yes, I did.

Q. What was in there besides Yen Shee?

A. Ladies wearing apparel.

Q. Ladies wearing apparel? A. Yes, sir.

Q. You heard Lieutenant Belland testify that there was men's in there, didn't you?

(Testimony of Joseph E. Goode.)

A. No, sir; I didn't hear that.

Q. You didn't hear that. You say it was ladies wearing apparel?

Mr. Pomeroy: I object, if the Court please. That is not my recollection of the testimony at all.

The Court: The objection is overruled. [64]

Mr. Onstad: Q. What ladies wearing apparel was in that suit case?

A. There was ladies skirts, blouses, some hose, brassieres, and a ladies pocketbook and panties, and things like that in there.

Q. Was there any identification in that suit case?

A. I didn't see any whatever, no sir.

Q. Did you see that War Ration Book pulled out of the suit case? A. I did not.

Q. Did you empty out the suit case or what did you do?

A. I just went through it. I didn't empty it out.

Q. How did you find the Yen Shee that was in the suit case without emptying it out?

A. It was on top of the white clothes when we opened it. There was just a little sprinkling, then we went down to the bottom to see if there was any Yen Shee.

Q. You mean to say that some Yen Shee was on top of the clothes and that it drifted down?

A. There were a few grains there and every time you would touch one piece it would roll with the clothes. Naturally we went all of the way through

(Testimony of Joseph E. Goode.)

to the bottom—Mr. Giordano did, and I was standing with him. By that time Mr. Graben turned the cover back and the evidence was there. [65]

Q. The Yen Shee was at the bottom of the suit case and you had to go through all of the clothes to get to the bottom of it, isn't that right?

A. No, sir.

Q. Did you take anything out of the suit case at all? A. No, sir.

Q. You just went through there with your hands?

A. With our hands, piece by piece; every time you would take one off it would roll off and go farther down to the bottom.

Q. How many pieces did you take off?

A. Five or six were on the top there.

Mr. Onstad: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: At this time we will take a noon recess until 2:00 o'clock. The jury will remember and heed the admonition about discussing this matter.

(At 12:15 p.m., Tuesday, July 23, 1946, Court recessed until 2:00 p.m., United States Court House.) [66]

Seattle, Washington, July 23, 1946,

Tuesday, 2:00 p.m.

(All parties present as before.)

The Court: Do the parties stipulate that call of the jury may be waived and that all the jurors are present and also all parties on trial with their counsel?

Mr. Pomeroy: Yes, sir.

The Court: Let the record show that.

You may proceed.

Mr. Pomeroy: Mr. Giordano.

### HENRY L. GIORDANO

called as a witness by and on behalf of the Plaintiff having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Henry L. Giordano.

Q. Your occupation? [67]

A. Narcotic Agent with the Bureau of Narcotics.

Q. How long have you been with the Narcotics Bureau?

A. Since March, 1941, except for a little over two years in the Military Service.

Q. Directing your attention to April 8, did you see the defendant Anne Johnson?

(Testimony of Henry L. Giordano.)

A. Yes, sir.

Q. Where did you see her?

A. In Room 1 at the Europe Hotel, 2016 First Avenue.

Q. Just prior to the time you saw her were you with other officers in front of that hotel?

A. Yes, sir.

Q. State what happened prior to that time until you went into the hotel.

A. I was in front of the hotel with Graben, Belland; Narcotic Agents Goode and Moodie. Narcotic Agent Graben and myself proceeded to enter the hotel at 2016 First Avenue. We opened the door to go up and talk to the manager.

As we started up the stairs I got a distinct odor of smoking opium. As I proceeded up the stairway the odor became more apparent. As I hit the top of the stairs I just followed the odor to the left; and right at Room 1, where the odor was emanating from the doorway. It was very strong right there at the door of-[68] Room 1.

Q. Then what occurred?

A. Well, at that time I left and went down and told the other agents—that is Narcotic Agent Goode and Moodie and Inspector Graben, that there was the odor of smoking opium from Room 1, and for the agents to come up. I also instructed Narcotic Agent Moodie to stay outside to watch windows.

I then proceeded upstairs with Narcotic Agent Goode and Inspector Graben, and went up to the front of Room 1 where I met Detective Lieutenant



(Testimony of Henry L. Giordano.)

Belland. At about the time I got there, Detective Belland knocked on the door. A woman's voice said inside, "Who is it?" He said it is Lieutenant Belland. She said "Just a minute and then there was some rustling. There was a hallway alongside of her room, which led out to the fire escape. I got out on the fire escape. I was out there for a few minutes when Narcotic Inspector Graben told me that he had gained entrance to the room.

Well, I motioned to Agent Moodie, who was waiting down in the street. And then I proceeded into the room.

Q. Did you see the window of this room from the fire escape? A. Yes, sir. [69]

Q. Then you came back from the fire escape. What did you do then?

A. I entered the room. Lieutenant Belland was inside and Narcotic Agent Goode and Narcotic Inspector Graben. As I entered the defendant was sitting on the side of the bed. The other agents at that time were starting to search so I proceeded over to where there was a bag and a trunk and opened the bag and started to look through the bag. There was women's clothing in the bag. On top there were a couple of blouses.

On the blouses there were very fine specks—I managed to get one speck on the end of my finger, and from the odor it was Yen Shee. At that time I asked the defendant where she was keeping the rest of her narcotics and she refused to answer. So I continued searching through the bag in an effort

(Testimony of Henry L. Giordano.)

to find where the opium was. I recall taking out the blouses, and I also found a woman's purse in there. However, I was unable to get any of this Yen Shee, enough to get on a piece of paper for evidence.

In searching the bag, I went through this purse and there wasn't any identification of any sort. Just about that time the defendant got up and started out of the room with Detective Belland. When the defendant arose from the bed, why, I turned around and just [70] then Narcotic Inspector Graben started over to the bed and grabbed the covers and threw the covers back. As he did so, why, the exhibits here were laying right on the bed.

Q. I now direct your attention to Exhibits 1, 2, 3, and 4; are those the articles that were on that bed?

A. Yes. These are all of the articles. They were all on the tray and the tray was on the bed.

Q. And those initials on there were placed on there by the officers; does your initial appear on there?

A. My initial appears on all of the items. I will check them to make sure of it. (Witness inspects items.)

Q. Did you touch or handle the pipe, I have forgotten the exhibit number now.

A. No, sir, I didn't touch that.

Q. You didn't touch it. A. No, sir.

Q. Was anything further said to the defendant

(Testimony of Henry L. Giordano.)

or in the presence of the defendant while you were there?

A. The defendant was asked where she got the opium that was on the tray in the jar. She refused to answer that. She was also asked by Detective Lieutenant Belland whether she had any other narcotics in the room and she said, "No, that is all there is." I left the room at that time. A short time later, the defendant [71] was brought out.

Mr. Pomeroy: You may inquire.

Cross Examination

By Mr. Onstad:

Q. Did you go down to the Police Station that night? A. At what time?

Q. After the arrest. A. After the arrest?

Q. Yes. A. No.

Mr. Onstad: That is all.

Mr. Pomeroy: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Pomeroy: Mr. Graben.

## WALTER G. GRABEN

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows: [72]

## Direct Examination

By Mr. Pomeroy:

Q. State your name to the Court.

A. Walter G. Graben.

Q. And your occupation.

A. Narcotic Inspector of the Bureau of Narcotics.

Q. Directing your attention to April 8th, did you see the defendant Anne Johnson?

A. I did.

Q. Where did you see her?

A. In Room 1 in the Europe Hotel, 2016 First Avenue, Seattle.

Q. Starting just prior to the time you went into the room, just tell what you did and who was with you and what was said.

A. I was seated in the automobile in the vicinity of the Europe Hotel with Narcotic Agents Goode and Moodie. I saw Detective Belland and Narcotic Agent Giordano enter the doorway leading to the Europe Hotel, on the second floor. In a short time Agent Giordano returned and came over to the car and said that they had detected a very pronounced odor of smoking opium upstairs and coming out from the premises in the front and asked that we come upstairs. I went upstairs with

(Testimony of Walter G. Graben.)

Agent Goode and Narcotic Agent Moodie remained on the ground [73] floor on the sidewalk. By the time we had reached the top of the stairway, I recognized the odor of smoking opium. I rounded the stairway to the left and went to the door. By that time it was very pronounced. I put my nose down to the keyhole and cracks in the door and it was what I would call a very strong odor of smoking opium.

Narcotic Agent Giordano went around to the fire escape, and at that time Detective Belland rapped on the door.

A lady's voice asked who was there and he replied, "Detective Belland." After a short while—I believe he rapped once more—and the defendant came to the door and opened the door. We entered the room and at that time Detective Belland advised the defendant that she was under arrest and we were going to search the place. I searched in various places and I went over to where Narcotic Agent Giordano was searching through a bag. He called my attention to some substance on some garments or blouses in this bag or traveling case which resembled Yen Shee.

Upon examining the small particles you could determine that it was Yen Shee.

Mr. Onstad: You say you couldn't determine that it was Yen Shee? [74]

The Witness: You could determine it, very definitely.

A. (Continuing): He continued searching the



(Testimony of Walter G. Graben.)

bag. Narcotic Agent Goode was also present. At that time the defendant who was seated on the side of the bed, and stayed seated right there all of the while we were there, left the room with Detective Belland. I didn't see how far they went or where they went, but I saw they went outside of the door. I went over to the bed immediately. She had been sitting on the sheet and the covers were thrown back towards the wall. I raised up the cover and saw this tray which is identified as Government's Exhibit 1, a brass tray, and on this brass tray was this improvised opium pipe considerable amount of Yen Shee, together with the lamp, the tin which contained oil—olive oil or cottonseed oil—this article which is a covering for the lamp to work over, and also the scissors and the other extras—yen hocks which are paraphernalia used by those who smoke opium.

I also found this Government's Exhibit 3, which is a jar containing sixty-five grains of smoking opium. And on the tray I found a quantity of Yen Shee, just laying loose on the tray.

Q. Did you feel the pipe when you first discovered this? [75]

A. I did. I picked the pipe off the tray and could feel that the pipe was still warm indicating recent use.

Q. Did you initial all of the exhibits?

A. I did.

Q. What did you do with the exhibits that you found there?

(Testimony of Walter G. Graben.)

A. I took possession of the exhibits and placed them in the vault in our office. I am custodian of evidence. They were in my possession in the vault in our office, 311 United States Court House.

The following morning on the 9th, these items were all placed in evidence envelopes and sealed and put back into the vault and later taken down to the chemist, who arranged them for analysis.

Q. Was that Mr. Ringstrom?

A. Mr. Ringstrom.

Mr. Pomeroy: You may inquire.

### Cross Examination

By Mr. Onstad:

Q. I understand, Officer Graben, that you and the other officers went there to investigate a large quantity of opium that was supposed to have been delivered to the Europe Hotel, is that correct—  
did you know anything about that?

A. I didn't have that information. [76]

Q. I beg pardon?

A. I didn't have that information.

Q. Whose directions were you under?

A. I am under the District Supervisor, Mr. Bel-  
land.

Q. Was he there that night? A. No.

Q. Who was the captain of your squad then?

A. I don't know as we had a captain.

Q. Well, you were acting under somebody's orders; who was giving orders around there that night?

(Testimony of Walter G. Graben.)

A. We worked in unison that night.

Q. Nobody had any authority, is that right then?

A. I don't know.

Q. You went up there and you didn't know what you were going up there for, is that right?

A. Oh, yes, we knew.

Q. I understood around here one or two of the officers said something about there was supposed to have been a large quantity of opium delivered to the Europe Hotel about that time; did you know anything about that at all?

A. No. My information was that there was opium being smoked in the Europe Hotel.

Q. That is all you knew about it?

A. I haven't finished my statement. We went up to the [77] Europe Hotel to ascertain from someone in the hotel,—the manager preferably—as to who might be smoking opium in the hotel.

Q. So that is all that you knew.

A. That is all I knew.

Q. You say you felt all of the articles on this tray—put your initials on all of them?

A. I handled every one of them, yes.

Q. Every one of them. And the only one that was hot was the pipe, is that right?

A. The pipe was warm, yes, sir.

Q. You were on the other raid down at Sixth and Jackson, too, weren't you?

A. Yes.

Q. You were with the officers and participated during all of that time?

A. Yes.

(Testimony of Walter G. Graben.)

Q. Did you talk to the defendant's mother at all? A. No.

Q. Did you talk to Kay Doran? A. No.

Q. Do you remember another girl being in the room? A. I do, yes.

Q. There were three women in this room all at one time, isn't that correct? [78]

A. Yes; the defendant, Kay Doran and the mother.

Q. To your best recollection, how long was it before you found those different exhibits that you have before you at the present time; how long had you been searching?

A. I would say perhaps fifteen minutes. Ten or fifteen minutes.

Q. It could have been longer? A. No.

Q. How many suit cases did you go through up there?

A. I observed Giordano going through just the one.

Q. There were some other suit cases there, too, weren't there?

A. I believe there were. He was searching in that end of the room.

Q. You searched the dressers, under the rug?

A. That is right.

Q. The curtains? A. Yes, sir.

Q. The boxes; did you go through the saw dust where the kittens were, that they used there?

A. No, I didn't.

Q. You didn't go into that? A. No.

(Testimony of Walter G. Graben.)

Q. Do you know whether anybody else did or not? [79]

A. I don't know; not to my knowledge.

Q. In other words, there was considerable search before you found that, isn't that correct?

A. Yes.

Q. How many officers participated in the search?

A. Four narcotic officers and Detective Belland.

Q. Were all of them in there at the time searching? A. Yes.

Q. Did you have a conversation with the defendant here after her arrest?

A. No, I didn't have any.

Q. Did you get her fingerprints?

A. No, I did not.

Q. Who has charge of that?

A. They were taken I think by Mr.—, the Bureau of Identification, Police Department.

Q. That was at your request, was it not; I mean you have every person who is arrested fingerprinted, don't you, or don't you know?

A. We do, yes.

Q. Has anybody ever been arrested for a narcotic charge who has not had their fingerprints taken?

Mr. Pomeroy: I object to that as improper cross-examination, if your Honor please.

The Court: The objection is overruled. [80].

Mr. Pomeroy: Whether everybody that has ever been arrested is fingerprinted?



(Testimony of Walter G. Graben.)

Mr. Onstad: Of his own knowledge whether it was a general custom.

The Court: If this witness knows he may answer.

The Witness: What was the question?

Mr. Onstad: Q. I asked you first if you knew that the defendant here had had her fingerprints taken and you said that she had at the direction of some Bureau; did you see her fingerprints?

A. No, I did not. It is an understanding with the Bureau of Records that we desire fingerprints from all of the persons who are booked for narcotic violations and they are always furnished us.

Q. Did you happen to know Solomon B. Zissu?

A. I knew who he was, that is all.

Q. Were you on the raid where he was arrested three and a half years ago?

Mr. Pomeroy: I object to that as improper cross-examination.

Mr. Onstad: It is only relative to our defense, your Honor. I was only laying the foundation for this person here to gather this up later on. [81]

The Court: The objection is sustained.

Mr. Onstad: Q. Did you know whether or not Solomon B. Zissu had a room at the Europe Hotel?

A. No, I did not.

Mr. Onstad: I think that is all.

Mr. Pomeroy: You may step down.

The Court: Step down.

(Witness excused.)

Mr. Pomeroy: Mr. Ringstrom.

## HUGO RINGSTROM

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Pomeroy:

Mr. Onstad: I will waive Mr. Ringstrom's qualifications.

Mr. Pomeroy: Q. Your name is what? [82]

A. Hugo Ringstrom.

Q. Your occupation is what?

A. Chemist for the Alcohol Tax Unit.

Q. You also serve under the Treasury Department with the Narcotics Division?

A. Yes, sir.

Q. And analyze evidence? A. Yes, sir.

Q. Directing your attention to that exhibit.

A. Yes, sir.

Q. What exhibit is that? A. Exhibit 3.

Q. Directing your attention to Exhibit 3, did you examine that exhibit? A. Yes, sir.

Q. What does that contain?

A. Smoking opium.

Q. How many grains?

A. Approximately eighty-five.

Q. Now directing your attention to the envelope with the Yen Shee, and to the opium pipe; did you examine those two exhibits also? A. I did.

Q. What did you find with regard to the analysis of the contents of those two exhibits? [83]

(Testimony of Hugo Ringstrom.)

A. They contain Yen Shee.

Q. Yen Shee. How many grains of Yen Shee?

A. I weighed this and found twenty-two grains, and this one eighteen grains—Exhibit 2 has eighteen grains.

Q. In other words, the total of the two exhibits is about forty grains of Yen Shee, is that right?

A. Yes, sir.

Mr. Pomeroy: You may inquire.

Mr. Onstad: I have no questions.

Mr. Pomeroy: You may step down.

The Court: You may step down.

(Witness excused.)

Mr. Pomeroy: At this time I would like a ruling on the exhibits.

The Court: Do you offer them now?

Mr. Pomeroy: I offer all of the exhibits.

The Court: The Court has before it the consideration of the offer of Plaintiff's Exhibits 1 to 4, inclusive. Each of them is now admitted.

(Plaintiff's Exhibits 1, 2, 3, and 4, received in evidence.)

Mr. Pomeroy: May I recall one witness, if your Honor please? [84]

The Court: You may do so.

Mr. Pomeroy: Mr. Belland.

The Court: Take the stand, Mr. Belland. You have already been sworn.

**GILBERT T. BELLAND**

recalled, having been previously sworn, testified further as follows:

**Direct Examination**

By Mr. Pomeroy:

Q. Mr. Belland, what did the defendant have to say with regard to this room in which you saw her; what did she say with regard to whose room it was? A. It was her room, she said.

Q. And that she slept there?

A. That is right. Her mother's room was in the back.

Mr. Pomeroy: That is all.

Mr. Onstad: No questions.

(Witness excused.)

Mr. Onstad: At this time I would like to make the usual motion.

The Court: Do you wish to be heard? [85]

Mr. Onstad: Yes, your Honor, I wish to be heard.

The Court: The jury will temporarily retire.

(Jury retires from the court room and the following proceedings were had without the presence of the jury.)

Mr. Onstad: May it please your Honor, and counsel for the Government, the objection which I made to the admission of all Government's exhibits introduced herein this morning, when I first made my objection it was, of course, relative to the motion to suppress.

I think that I have to object to the introduction of all of that evidence on the ground and for the reason that it is our contention here that the evidence seized was contrary to the constitutional amendments IV and V. The Court I understand is going to allow me an exception to the admission for that one purpose.

The Court: That is true.

Mr. Onstad: Now, relative to the challenge to the sufficiency of the evidence.

At this time, your Honor, I challenge the sufficiency of the evidence as to Counts I, II, III and IV, and move for a directed verdict on all of the Counts. I particularly move for a directed verdict [86] on Counts I and III, which are the purchase counts.

The Court: And the so-called possession counts.

Mr. Onstad: Well, the charges of purchase—yes. And on the grounds and for the reason that there is not sufficient evidence in this case to establish that this was a purchase within the jurisdiction of this Court; also the time relative thereto was not fixed by the Government. I challenge the sufficiency of the evidence as to the grounds II and IV relative to the Yen Shee for the purpose that if there was a purchase made in this case, it must have been one purchase, and that the division of this purchase by using some of this opium to smoke and then the residue of Yen Shee means that it is a part of the whole; it is the same as if a person would go down and buy a gallon of liquor and



divide into four bottles, there wouldn't be four purchases.

So consequently in this case, as to the Count III being the purchase of Yen Shee, it couldn't possibly be consistent with Count I because it is a residue of the original. Therefore, that Count certainly is out. Also, the concealment of Count IV shouldn't be given to the jury for the reason that it is part of Counts I and II. There isn't sufficient evidence [87] in this case to establish the question of fact for this jury to determine whether or not this Yen Shee was purchased separately or whether it was the residue of the opium.

And all of the testimony of the officers shows and indicates here, as part of the pipe indicates, that part of the Yen Shee is part of the opium which was taken out of the first bottle there which had the smoking opium in it.

Therefore, the Government is in this position: It claims that she purchased on a certain day certain Yen Shee; and then that she also concealed Yen Shee and purchased opium and concealed opium, whereas all of the testimony here, relative to the jury, would indicate if there was any indication before the facts, that the Yen Shee is a part of the opium or a derivative therefrom and consequently there could be only one purchase.

If the Court allows the case to go to the jury on Counts III and IV, the Court is going to do so upon the theory that there is sufficient evidence in this case that she purchased Yen Shee. How could that be so under the evidence in this case when all

of the evidence indicates that there was one purchase made which was the purchase of opium and all of the derivatives [88] therefrom is ancillary thereto. It is the same as a person being charged with four purchases and four concealments. The two counts are absolutely inconsistent relative to the Yen Shee unless the Government can establish beyond a reasonable doubt that the Yen Shee was purchased separately from the opium.

If that can be implied under the facts in this case, then the Court could submit those two counts to the jury.

But if they are not, and the Court is going to submit it to the jury, whether or not she purchased this Yen Shee separately or whether or not it was a derivative or ancillary of the original purchase of opium, it is allowing the jury to speculate.

I think that Counts III and IV under the facts of this case, and the inference to be drawn therefrom, only possibly could be that the Yen Shee was a part of the original purchase and, therefore, the submission of those last two Counts to the jury would be error.

I so challenge the sufficiency of the evidence, if the Court please.

The Court: The Court is satisfied that these motions should be overruled and that the challenge to the sufficiency should be likewise overruled.

The court considered this case on the technical [89] side on the motion to suppress.

I came to the conclusion then, and I am still of that opinion, that this search and seizure was a

valid one in view of the certainty in the minds of each one of these officers that an offense of this sort was being then and there committed, which certainly came to them by virtue of their conviction that from the smell of the fumes from the smoking, it indicated to them that there was an unlawful possession of un-tax paid opium being had and enjoyed at the particular moment.

The different identification of the articles alleged in the separate Counts seems to me to be sufficiently established by the evidence so far as a case sufficient to go to the jury is concerned.

I do not take the view that counsel for the defendant takes, that it would be impossible here to have two distinct kinds of narcotics among these several exhibits.

Mr. Onstad: I might say to your Honor that my position is this: that the Counts should have been this way,—Count I should have been eighty-five grains of opium and so many grains of Yen Shee, all in one Count. Count II should have been eighty-five grains of opium and so much Yen Shee. They have divided the [90] four, making it look as if the Yen Shee was purchased either on the same date or as a separate transaction, whereas it is not a separate transaction. It is a part of the same. They both come under the same section.

The Court: I think the instructions of the Court, which are usually given in cases like this, will clarify that, as to the effect of possession of un-tax paid narcotics.

That is one instruction.

The other one, relating to the charge in Counts II and IV, will I think help to clarify that.

I am unable to take the defendant's view as expressed in connection with this challenge as to the sufficiency of the evidence, and these motions. Therefore, as previously stated, the challenge is overruled and the motion is and each of them denied.

Mr. Onstad: The defendant will be allowed an exception, if your Honor please?

The Court: That is true. It is so ordered.

Do you wish to mention anything else in the absence of the jury?

It is now 2:35. Do counsel care to indicate how much time will be required to submit the case to the jury? [91]

Mr. Onstad: I think in our case perhaps one hour or one hour and a quarter.

(Discussion off the record as to length of trial.)

(The following proceedings were had within the presence of the jury.)

The Court: Let the record show all of the jurors have returned to their places as before and that all parties with their counsel are present.

You may proceed.

Mr. Onstad: Anne Johnson.

## ANNE JOHNSON

the defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Onstad:

Q. Your name is Mrs. Anne Johnson?

A. Yes.

Q. What was your maiden name?

A. My name was Anne Dauenhauer. [92]

The Court: I understood her name is Anne Johnson, is that her name?

Mr. Onstad: That is her maiden name.

The Court: What significance does the other have?

Mr. Onstad: The other as her maiden name.

Mr. Pomeroy: What is it?

Mr. Onstad: Anne Dauenhauer.

Mr. Onstad: Q. How old are you?

A. I am thirty-nine years old.

Q. How long have you been in the city of Seattle?

A. About two years.

Q. How long were you here before you purchased the Europe Hotel?

A. Oh, I wasn't here—I was in Yakima; but I had been in the States about six months prior to that.

Q. Where were you before the six months?

A. In Alaska.

Q. How long were you in Alaska?

A. Thirteen years.



(Testimony of Anne Johnson.)

Q. What was your business in Alaska?

A. I was in the hotel business.

Q. During most of the time or all of the time?

A. Well, ten years of it I was in Juneau, Alaska.

Q. In the hotel business?

A. Yes, sir.

Q. Did you work at one time for an undertaker or a photographer there?

A. That was in Nome, later.

Q. What year was that?

A. '31, '32, '33, '34.

Q. After that, was that when you came here and brought the hotel? A. Yes, that is right.

Q. A number of years ago you entered a plea of guilty? A. I did.

Q. You loaned some girl,——

A. Forty dollars to go to Fairbanks.

Q. And you paid her daughter's board, her 3-year old daughter?

A. Yes, three months.

Q. She got in trouble and you plead guilty to that and——

A. It was a case of jealousy.

Mr. Pomeroy: I object on the ground it is leading. I think we would get further if we didn't have such leading questions.

The Court: I think it is unnecessarily leading. Try to avoid that in future questions.

Mr. Onstad: My question was: did she get in [94] trouble a number of years ago in Alaska and

(Testimony of Anne Johnson.)

if she entered a plea of guilty up there in Federal Court.

Mr. Pomeroy: I object to the question as it now stands as being very leading.

The Court:.. It is leading. The objection is sustained.

Mr. Onstad: Q. I will ask you then whether or not you were arrested in Alaska? A. Yes.

Q. What was the outcome of that case?

A. I just pled guilty to it.

Q. And you paid a fine? A. Yes, sir.

Q. And the circumstances were that you did what?

A. I gave a lady forty dollars to go to Fairbanks.

Q. Where were you living at the time?

A. In Juneau.

Q. Where were you raised, Mrs. Johnson?

A. Most in Yakima.

Q. Is your mother living? A. Yes.

Q. Where is she now? A. She is present.

Q. She is in the court room here? [95]

A. Yes.

Q. How long has she been over in Seattle living with you?

A. She got here on the 1st day of November, last year.

Q. When she came here, where did she stay in the hotel?

A. She stayed with me for about six or seven

(Testimony of Anne Johnson.)

months, until we had a vacant place for her to live in.

Q. What room did she stay with you in?

A. She stayed right in Room 1 with me.

Q. Did the two of you sleep there?

A. We certainly did.

Q. In that three-quarter bed?

A. Yes.

Q. Slept there every night?

A. Yes.

Q. How long has it been since you were able to get the vacant room and let your mother have a room of her own?

A. I don't know, four months ago or five months ago; I don't remember exactly.

Q. This Room 1, will you tell the jury what kind of a door it is and how large a room it is—what did you have in there?

A. Well, the room is very small. There is a glass door, and you can see through it from the outside. All of the roomers come and pay their rent there. It is certainly nothing private. In the room I have a desk— [96] I have a three-quarter bed. I have a big cedar chest. The window—there is a big bay window with an alcove, and there is a sort of bench there that takes up about four feet—maybe not four feet but something like that, and a big Chiffonnier. Then there is a sink. At the time we happened to have a little cat with some kittens also in the room.

Q. This room was approximately 9 by 12; is that correct?

A. That is right.

(Testimony of Anne Johnson.)

Q. The bed takes up a great part of the space?

A. It does.

Q. Now, this room is used for your sleeping room, and what else?      A. Office.

Q. Where the people come and pay their rent?

A. That is right.

Q. How many rooms do you have in the hotel?

A. I have thirty rooms.

Q. Are there any apartments there?

A. Yes. There are about twelve apartments.

Q. How many people are there occupying your hotel as tenants?

A. Well, I should judge thirty-five. There are some doubles—mostly singles.

Q. Are there people coming up and going down those stairs [97] quite often?      A. Yes.

Q. The room which you have is not very far from the head of the stairs?      A. No.

Q. I will ask you to state whether or not there was a man by the name of Zissu, also known as Sewel Hemlock, came to your hotel?

A. That is right.

Q. How long have you known him?

A. I have known of him a long time, but I never met him until I came back this last time from Alaska.

Q. Did you have any business transactions with him?

A. Yes; he helped me when I didn't have any money. When I purchased the hotel he gave me \$650.00.

(Testimony of Anne Johnson.)

Q. Where did you get the rest of the money to purchase the hotel?

A. From my brother-in-law.

Q. How much money did you get from him?

A. \$1850.

Q. With the money from the two of them you bought the hotel, is that right? A. Yes.

Q. Did you pay Mr. Hemlock back?

A. Yes. [98]

Q. Was he ever a tenant of your hotel?

A. Yes, he was.

Q. When did he come there first?

A. In March.

Q. Of this year? A. Yes.

Q. What room did he get?

A. He had Room 20 on the third floor.

Q. Directing your attention to some time around the first part of April, what relations did you have with him as far as renting the room or giving up this room was concerned?

A. Well, one day he called up and he said "I am giving up this room because I am going to Soap Lake"—which happened to be on a Thursday. So as everybody had been around looking for rooms I proceeded to start cleaning the room. He said there was a bag up there and to take care of it. So we had been very crowded there, and there is no place for a storeroom or anything, and things like that, I have been perhaps careless, I have been taking in anybody's baggage and putting them in our own quarters, because I had no place else. A



(Testimony of Anne Johnson.)

few times people had broken in and things had disappeared there; so I was taking care of it. This was on a Thursday. So on a Saturday he came up [99] and asked me where the suit case was.

Q. What time was it?

A. Saturday?

Q. Yes.

A. I don't know; it was about 5:00 or 6:00 o'clock in the evening. It was before we had dinner anyhow. We went in the room because we had been painting and kalsomining and trying to clean up the place. The place was very filthy. That was the idea of my mother coming over, to help me.

I asked him, I said, "When are you going to Soap Lake?" And he said, "Well, I might go any time; it might be the first of the week." I said, "O.K., I will see you Monday or so." So Monday he came up and asked me for the key,—I had just been to Sears Roebuck all afternoon shopping for hall rugs and curtains and what have you. We got home at ten minute to 6:00. We had not been home very long and Mother as a rule has dinner ready around 7:00 o'clock. I gave him the key to go in there because on Saturday I wondered why he didn't take the suit case, so I did look into the suit case. I wondered why it was still there.

Q. When you looked in the suit case, tell the Court what you saw. [100]

A. Well, it was in a paper bag that had been pulled open,—this whole thing.

Q. Did you know there was opium there?

(Testimony of Anne Johnson.)

A. I didn't pay any attention to it. I kind of had an idea what it was, yes.

Q. You knew he was—— A. An addict.

Q. He told you that? A. Yes.

Q. Was he a sick man?

A. Yes; under the doctor's care.

Q. Go ahead and tell the Court what happened.

A. He went to the room—I don't know, about 6:30. We had had dinner and, I don't know,—it was probably an hour or maybe it was forty-five minutes, I don't know how long. Anyhow, he rang the bell and gave me back the key and left. He said, "I will be back later." He said, "I will be back tomorrow for sure." In the meantime we washed the dishes and fooled around. I went in after being out all day. I had painted until noon before we left, trying to get the hallway straightened out so we could lay these rugs in case they delivered them.

Q. Had you painted the day before, too?

A. I had been painting for six weeks, every day. [101]

Q. Was that in the hallway, in and around your room there?

A. Yes; we were painting it and the hall.

Q. Go ahead.

A. It must have been about 7:30 or a quarter to 8:00, I took a bath and went to bed. I thought I would lay down for a couple of hours. My mother was sewing curtains. I had been getting up pretty early several mornings and I was pretty tired. I

(Testimony of Anne Johnson.)

had been there not very long, about an hour or forty-five minutes when they came and banged on the door. I said, "Who is it?" Somebody said, "Mayor Devin." I said "Mayor Devin?"

I got to thinking, "What would Mayor Devin want here." In the meantime I was getting out of the bed. The first thing that naturally struck me that that must be it. I just took it out of the bag. I didn't know what else to do, I just put it in the bed, and then I left them there. It took me four or five minutes.

Q. How long did they search there?

A. They searched a good forty-five minutes, because they went through everything.

Q. How long was it after the officers started searching that Kay Doran came in?

A. Not very long. She was smoking a cigarette as she entered the door. One of the officers said, "Can't [102] you smell anything?" She had the cigarette in her hand—she said, "Well, I don't know. I am smoking a cigarette." She was dumbfounded. She didn't know what it was all about.

Q. She was called back to Michigan, wasn't she, due to illness of her mother?

A. Yes; the illness of her mother. Then they placed her under arrest and she stood behind the door practically all of the time they were searching.

Q. How long was it after she came in before your mother came in?

A. One of the officers saw her come in and grabbed her and scared her to death.

(Testimony of Anne Johnson.)

Q. Was she crying? A. Yes.

Q. Where was she in the room?

A. She sat next to me.

Q. How long was she there before you talked to Lieutenant Belland?

A. Three or four minutes.

Q. What kind of a conversation did you have with him?

A. I said they don't know anything about it, let them out of there. I figured on explaining it to them but I didn't have a chance to explain anything to any of the officers because in the meantime after Officer Belland [103] said Mother could go, somebody turned back the covers. I was in the hall—sort of by the fire escape. We were talking. I didn't see anything, because he was too big standing in the doorway.

Q. How long was it before you were taken down to the Police Station?

A. Not very long. They even wrapped the things in the same paper that I took them out of.

Q. Did you have a conversation after going to the station with Lieutenant Belland, and some other officers?

A. Yes.

Q. What was that conversation?

A. Well, they wanted to know if I still wanted to claim it, to make up my mind.

Q. What did you say?

A. I said, yes, I wasn't going to implicate anybody because it wouldn't help me out anyway. I would still be implicated.

(Testimony of Anne Johnson.)

Q. Was there anything said about this man being a very sick man?

A. Yes. I told them, "The party that this really belongs to is a lot worse off than I am."

Q. Were your fingerprints taken?

A. Yes, sir.

Q. When were they taken? [104]

A. The next day in the County-City Building.

Q. I will ask you to state where you have seen this before or where you saw it, the War Ration Book.

A. After I came back this was on the floor. It had somehow fallen out of the suit case.

Q. Was that the name of the man who had rented the room? A. Yes.

Q. The name of the man you had borrowed the money from? A. Yes.

Q. And the name of the man who was sick?

A. Yes.

Q. Who owns this stuff up there; do any of it belong to you?

A. No, it does not belong to me.

Q. Did you ever smoke that pipe there?

A. No; no, I never have.

Q. Did you ever smoke any opium at any time?

A. No, I have never been ill or anything to have any occasion to.

Q. Have you ever used any narcotics of any form? A. No.



(Testimony of Anne Johnson.)

Q. Did you smell anything peculiar about your room that evening when the officers came?

A. No, I wouldn't, because I had been painting for so long that I didn't know. [105]

Mr. Onstad: I guess that is all.

Cross Examination

By Mr. Pomeroy:

Q. You say you had just gone to bed when they came?

A. Yes. Well, I had taken a hot bath and had been in bed a good half hour or maybe forty-five minutes.

Q. You only intended to go to bed for a couple of hours and then you were going to get up again, is that right?

A. Well, maybe, I didn't know. It was early—I was just going to rest awhile. I do that all of the time because I get up early.

Q. In other words, you undress completely and go to bed. A. Yes.

Q. And then sleep a couple of hours and then get up, is that it? A. Yes.

Q. That man Zissu, you say you didn't know him prior to the time he loaned you \$650.00?

A. Oh, yes; I knew him, certainly.

Q. How long did you know him before that?

A. Oh, about six months at least.

Q. Did you give him any security for this \$650.00? A. No. [106]

Q. Not at all?

(Testimony of Anne Johnson.)

A. No; he had made a habit of loaning people money. He had money.

Q. He made a habit of loaning people money so he loaned you \$650.00? A. That is right.

Q. Do you mean to say this room, number 1, that we have talked about here has a window in it so that you can look right into it? A. Yes.

Q. Did Lieutenant Belland look into it when he was knocking on the door?

A. He certainly could if he was standing in front of it because I could see them.

Q. Were you in bed there and anybody in the hall could look right into the room and see you in bed? A. Yes, that is right.

Q. The paper bag you say was over these exhibits when you saw it?

A. No; when I pulled it out of the bag.

Q. When you pulled it out of what bag?

A. Well, out of the suit case.

Q. Out of the suit case. It was in a paper bag, was it? A. Yes.

Q. What size paper bag was it in? [107]

A. A pretty big one.

Q. How did you know it was in the paper bag?

A. Because I looked Saturday.

Q. Well, that is the day you were arrested, wasn't it?

A. No. I was arrested on Monday.

Q. And so this time that you went to bed, was that on Saturday night or Monday night?

A. It happened to be on Monday night.

(Testimony of Anne Johnson.)

Q. When was the last time that you saw Zissu?

A. I saw him Monday evening about 7:00 o'clock or 6:30.

Q. Did you say that on Saturday you had looked?

A. He promised to take the bag and didn't. I wondered why he didn't, why he left the bag.

Q. Did you talk to him about the bag?

A. Yes.

Q. Was he there Monday night, too?

A. Yes.

A. He was there every night?

A. No, not every night.

Q. Was he there the night you were arrested?

A. Yes; he had been there earlier.

Q. Was he there the Saturday night before that?

A. Yes.

Q. The Friday night before that?

A. No. [108]

Q. Every other night?

A. I hadn't seen him for a long time. He called up Thursday and told me he was vacating the room.

Q. So you say that the officers took these exhibits away in the paper bag, is that right?

A. The papers that it came in. That is the only papers that were there.

Q. The paper bag that is what you are talking about, isn't it? A. Yes.

Q. What color was that paper bag?

A. Brown.

(Testimony of Anne Johnson.)

Q. When the exhibits were left in your room they were left in that bag, is that right?

A. No. They had other papers, too, because the bag was torn.

Q. What other papers did the officers have?

A. The reason it was torn, I took it off and put it under the covers. I was afraid they would make a noise. That is why I took it out of the bag.

Q. Then you took this tray and stuff out of the bag and then put it under the covers?

A. Yes; I took it from the suit case and put it there.

Q. I am now talking about the paper bag; where was the paper bag? [109]

A. In the suit case.

Q. Oh, you left the paper bag in the suit case?

A. No.

Q. What?

A. I took the whole thing out of the suit case.

Q. The paper bag and all? A. Yes.

Q. Then when you put it under the bed covers, did you leave it in the paper bag? A. No.

Q. What did you do with the paper bag?

A. I suppose I threw it any place. I don't remember.

Q. Did you do that when there was a window in there that Lieutenant Belland could watch you?

A. I can see out but you can't exactly see in, unless you are right before that window—before the glass.

Q. You can't see in now?

(Testimony of Anne Johnson.)

A. You can if you really want to look.

Q. So you might have been doing this and Lieutenant Belland could have been looking right in the door?

A. That is right; he could have if he had taken the time to look.

Q. Anyway, you went ahead and hid this even knowing that somebody could have been watching you, did you?

A. Well, sure; how would you do anything?

Q. You would do anything?

A. Anybody would perhaps do the same thing.

Q. What happened to this paper bag?

A. I wouldn't know. I went to jail.

Q. What is that?

A. I was arrested. I don't know what happened to the paper bag.

Q. Well, you came back pretty soon. You didn't spend all night in jail, did you?

A. I certainly did. I spent darn near three days there.

Q. When you came back you couldn't find the paper bag?

A. They really wrecked the room. They went through everything.

Q. What was there they wrecked?

A. They went through everything. They mussed it up, anyhow.

Q. What else was in that suit case?

A. I never looked myself.

Q. Was there a lady's purse in there?



(Testimony of Anne Johnson.)

A. I never looked through it at all myself.

Q. All you know is that this opium outfit was in it?

A. That is right, because it was right on top.

Q. Did Zissu come back and get his suit case?

A. Yes, he got the suit case.

Q. He died did he not? [111]

A. That is right; he is dead.

Q. He passed away some weeks ago?

A. That is right.

Q. So he can't come in and testify in this case here at all, can he? A. No, he can't.

Q. But he came back and got the suit case?

A. Yes.

Q. You don't know what was in it?

A. No, I didn't look.

Q. Well, you looked into it?

A. I mean I didn't look any further.

Q. All you looked at was just to find out how much opium was in there?

A. I knew there was something in there that didn't belong there. I knew that he was sick and he was under the doctor's care. For all I knew the doctor prescribed it for him. I didn't ask him any questions.

Q. How long after Detective Belland rapped on the door and you said, "Who is it?" you say he said "Mayor Devin," and he says he said, "Lieutenant Belland." A. That is right.

Q. You say you think he said "Mayor Devin"?

A. I know he did.

(Testimony of Anne Johnson.)

Q. You heard him state; and other witnesses; that he said [112] "Lieutenant Belland"?

A. Yes.

Q. How long was it from the time he knocked on the door before you opened the door?

A. I did all of that and I dressed. They knocked three or four times. They were going to kick the door down. I said, "I am going to put on some clothes; I am in bed." I put on my clothes.

Q. Did you get completely dressed?

A. Yes, sir; I did.

Q. As a matter of fact, you had to ask them to wait awhile so that you could get dressed to go to the Station, didn't you?

A. Regardless of what it was, I wasn't going to be in there in the nude.

Q. Were you in the nude when they knocked on the door? A. I certainly was.

Q. You were in the nude when they knocked on the door. A. I was.

Q. Which did you grab first, the clothes or the opium?

A. I dressed first, and I was doing a lot of thinking in the meantime, wondering why they were there. When he said, "Mayor Devin," I was trying to figure why they were there. I dressed first, that is right.

Q. Did you get all dressed because you thought it was [113] Mayor Devin?

A. Regardless of who it was I wasn't going to open the door in the nude.

(Testimony of Anne Johnson.)

Q. You don't know what happened to the brown paper bag? — A. No, I don't know.

Q. You didn't see any officers at all with it, did you?

A. I suppose they wrapped the stuff in it. I don't know. I didn't pay any attention.

Q. Do you mean to say that you didn't have a chance to explain all of this to the officers that night?

A. No, I didn't. I asked them what they wanted and they said, "Oh, you will find out." Real nasty and very sarcastic.

Q. Then you took Lieutenant Belland out in the hall, didn't you?

A. That was ten or fifteen minutes afterwards.

Q. All right. And you didn't have time during that ten or fifteen minutes to explain what this was all about?

A. No. I was sitting on the bed.

Q. You could have said what you wanted to, couldn't you?

A. That is right. But I wasn't going to until I had to.

Q. Why didn't you explain it then?

A. I didn't have a chance to. Nobody asked me.

Q. Then you took Lieutenant Belland out in the hall and you told him if he would get your mother out of there, [114] you would come up with it? — A. I didn't say that at all.

Q. What did you say?

A. I just said, "If you will let my mother out of

(Testimony of Anne Johnson.)

there and let the lady out of these, I will talk to you." I didn't say what. But I did say I would talk to him privately or talk to them. I didn't say what I was going to do.

Q. When you got up off the bed where you were sitting, knowing that they were searching your room, you knew they would find this, didn't you?

A. Maybe they might, I didn't know what they were searching for. To be truthful about it, I didn't know.

Q. You didn't know they were looking for narcotics? A. No, I did not.

Q. Had you been doing anything else that you thought they might be searching for anything else?

A. No. I didn't know. I could have thrown it down the sink or out the window. I have a big bay window that I could have thrown it out. I could have thrown it over his head if I had known I would be guilty of something like that.

Q. You couldn't destroy all of that evidence?

A. Well, they would have a hard time trying to find it.

Q. After they arrested you, they took you down to the [115] Police Station; didn't they talk to you down there? A. Very little.

Q. Couldn't you have explained all of this that you are trying to tell the jury now, couldn't you have said this at that time?

A. I never had very much respect for anybody that would deliberately stool on anybody. I figured



(Testimony of Anne Johnson.)

as long as the fellow was sick for all I knew it was legal with him.

Q. You thought that this opium outfit was legal?

A. With him because he was under the doctor's care.

Q. That is why you hid it, because you knew it was illegal?

A. I hid it because I thought that if I could protect him I would. He had befriended me.

Q. If it was legal you wouldn't have to protect him, would you? A. I didn't know.

Q. You didn't know? A. Certainly not.

Q. How many times were you arrested up in Alaska? A. Just one time.

Mr. Onstad: Objected to if the Court please. It only goes to challenge the character of the witness. At this time I move the Court for a new trial on the [116] ground and for the reason that the District Attorney has asked a very improper question which has been held by many courts as improper.

Mr. Pomeroy: That would be true if the witness had not been asked on direct examination if she had been arrested in Alaska.

Mr. Onstad: She was asked if she had ever been convicted of a crime and that is as far as the District Attorney can go.

The Court: Counsel for the defendant himself asked her concerning her arrest.

Mr. Onstad: I asked her if she was convicted.

The Court: The objection is overruled. You



(Testimony of Anne Johnson.)

may ask her about that arrest, Mr. Pomeroy and not about others.

Mr. Pomeroy: If the Court please, I would like to have the reporter read back the way it was opened up on direct. I think he opened it up directly.

Mr. Onstad: I did not.

The Court: The Court rules that you may ask her about that arrest, not others that didn't result in conviction.

Mr. Onstad: If he has any conviction I will be very glad to stipulate with Counsel that he can show any and all convictions she has ever had. [117]

Mr. Pomeroy: Q. Mrs. Johnson, how long did you live in Yakima after you were born there?

A. I wasn't born there.

Q. Where were you born?

A. I was born in Taylor, North Dakota.

Q. How old were you when you came to Yakima?

A. About nine years old.

Q. How long have you lived in Yakima?

A. Off and on—I don't know—the rest of my life off and on outside of being in Alaska. But I made my home in Yakima.

Q. Where else have you lived?

A. That is all.

Q. Just in Alaska and in Yakima and North Dakota?

A. Yes. I was very young in North Dakota.

Q. What is that?

(Testimony of Anne Johnson.)

A. I lived in Montana. My dad was railroading and we lived in Montana for awhile when I was a child.

Q. You have lived in Seattle now for a couple of years, is that right? A. Yes.

Q. How many different towns in Alaska did you live in? A. Just Nome and Juneau.

Q. Did you ever live in The Dalles, Oregon?

A. Yes. I lived in The Dalles, Oregon. [118]

Q. How long did you live there?

A. I lived there just a very short time.

Q. Did you ever live in Honolulu?

A. I have been in Honolulu; I never lived there.

Q. How long did you stay in Honolulu?

A. Not very long.

Q. How long?

A. Maybe four or five months or six months.

Q. How long did you live in Alaska altogether?

A. Thirteen years.

Q. What was the date of the conviction that you had in Alaska?

A. The date of it? I don't remember.

Q. Was it April 22, 1940? A. Yes.

Q. And it was in Juneau, is that correct?

A. Yes, that is right.

Q. And the charge was transporting women for immoral purposes?

A. Not women; one woman who happened to be going there.

Q. You were transporting her?

(Testimony of Anne Johnson.)

A. I was not transporting her. I was helping her out.

Q. That was the charge.

A. Yes. The Prosecuting Attorney absolutely wouldn't prosecute it. [119]

Q. You pleaded guilty? A. Yes.

Q. He wouldn't prosecute you because you pled guilty?

A. He absolutely knew it was all wrong.

Mr. Pomeroy: That is all.

**Redirect Examination**

By Mr. Onstad:

Q. Mr. Pomeroy has insinuated that you didn't tell the officers about this that night. Isn't it true that the conversation you related here earlier you had with Lieutenant in his office about this stuff and who it belonged to? A. Yes.

Mr. Onstad: At this time, your Honor, I move the admission of Defendant's Exhibit 1, which is the War Ration Book of Solomon B. Zissu, which was found in the defendant's room after she returned from jail. I also move for the admission of the Petition, the appraisal and also the third declaration which is a Creditor's Claim, showing that Solomon B. Zissu was a roomer for a good many years at the Caledonia Hotel. The purpose of this admission, your Honor, is to show that he was also at the time, according to the Creditor's Claim filed by the Caledonia Hotel, that he [120] came over to her place and got a room for a month, and that

(Testimony of Anne Johnson.)

he was living at both places at the time; and that he came over there for some reason that we do not know, resulting in the thing that happened here.

The Court: Those papers I don't believe have been identified.

Mr. Onstad: These which I am handing up to your Honor are certified copies by the Clerk of the Superior Court of King County, Norman Riddell, and are exact pictures taken of the records in that particular case which is now on file in the Superior Court of King County.

They are admitted for two purposes, your Honor.

The Court: Do you mean they are offered for two purposes?

Mr. Onstad: Yes. They are offered for two purposes: one is to show the deceased's death so that we can't have him here at the trial. The second is to show that he was living, not only in the Europe Hotel but was occupying, and has for a long time, a room in the Caledonia Hotel, showing that he had come to this hotel for some sinister purpose.

Mr. Pomeroy: I object to Exhibit A-1, the Ration Book,—I object to the admission of that exhibit on the ground that the defendant herself testified she didn't [121] know what was in that suit case; anything except the opium layout. That the first time she saw this Ration Book was when she returned from jail some two or three days later. There is no connection between this case at all and that ration book whatever. There is no purpose



(Testimony of Anne Johnson.)

it can serve so I object to it on the grounds it is incompetent, irrelevant, and immaterial.

The Court: Is there any response to that, Mr. Onstad?

Mr. Onstad: Yes, your Honor. My position is this; that this Solomon B. Zissu was a tenant of her hotel and that her testimony was that she got this suit case out of his room on Thursday and brought it down to her room on that day he was vacating his room, and that they searched her room that evening and when she came back she found this ration book, which clearly shows how she had his ration book in the room,—his suit case being in the room at the particular time. The ration book was taken out of the suit case and left there at the time.

Mr. Pomeroy: There is no such evidence.

Mr. Onstad: How did she come into possession of the war ration book unless it was left there by somebody?

The Court: The Court does not recall any evidence [122] to support that statement. The objection to the offer is sustained. The offer of Defendant's Exhibit A-1 is denied.

Mr. Onstad: Exception, if your Honor please on that.

The Court: Allowed.

Mr. Pomeroy: I object to Exhibit A-2, -3, and -4 on the ground that they are incompetent, irrelevant, and immaterial. They happen to be a Petition for Letters of Administration, the Creditor's



(Testimony of Anne Johnson.)

Claim for the Caledonia Hotel, and Inventory and Appraisement. A-4 is the Inventory and Appraisement. That, of course, has nothing whatever to do with this case.

A-3 is the Creditor's Claim which doesn't say whether it is a good creditor's claim or not. It is wholly immaterial as to whether or not he was living in the Caledonia Hotel or any other place. The testimony seems to be that at one time she thought so much of this fellow she didn't want to involve him in it. Now that he died he is a very sinister character and they want to show he had two hotel rooms. If he did have a room in the Caledonia Hotel, it doesn't say in this document that he did have; it just says that he had some room rent. He may have had someone else living in the room for all we know and the claim be no [123] good.

The Petition for Letters of Special and General Administration, signed by Albert D. Rosellini, I think is objectionable on the ground it is incompetent, irrelevant and immaterial. If they want me to stipulate that Solomon Zissu died three or four weeks or after her story at the Police Station, and between the time of her story at the Police Station and her story here now, I will so stipulate he is dead.

Mr. Onstad: In this case, if your Honor please, we are faced with this position justifying the possession of those articles. The law says that we can put in any evidence upon which we can sustain that they belonged to somebody else. The proof

(Testimony of Anne Johnson.)

that has been put in here is that this man who owned this ration book was a tenant of her hotel and that he checked out on Thursday night and that she got the suit case and he was going to Soap Lake, and that she took the suit case down in her room; that she did not look at the suit case until Saturday after he had been there once, and then she looked in there and saw that there were some articles in there that she didn't know exactly what they were but she knew that he was using narcotics and undoubtedly that that was part of it. [124]

She did keep it in her room and he came back Monday night. That is twice. When she came back to the room she finds this War Ration Book, —how did that War Ration Book get there? She is entitled to go ahead and show any justification for this thing.

The Court: The objection is sustained on the theory that this evidence contained in A-2, A-3, and A-4 does not prove or tend to prove that this man Zissu was a tenant in the Europe Hotel, owned and operated by this defendant.

Mr. Onstad: You have the direct testimony here of—

The Court: The Court has already ruled and has heard your argument.

Mr. Onstad: Relative to the Creditor's Claim here, Counsel says it doesn't show he had been there. It says, "This room had been occupied by the deceased."

The Court: The Court has already ruled upon

(Testimony of Anne Johnson.)

Exhibit A-2, A-3, and A-4, each of them being denied.

Mr. Onstad: Will the Court allow an exception on that?

The Court: Allowed.

Mr. Onstad: At this time, your Honor, I wish to introduce in evidence in this Court the entire file in 45948, entitled, "United States of America vs. Solomon [125] Bernard Zissu, and the entire record showing that the defendant Zissu, who was a tenant of the rooming house of this defendant, was charged with six counts with the possession, concealment, and sale of not only opium but Yen Shee; and that he was given a 5-year suspended sentence by Judge Levy of this court; and that sentence was entered on the—

Mr. Pomeroy: If the Court please, I object to Counsel testifying on any document until it is entered in evidence.

The Court: The objection is sustained.

Mr. Onstad: At this time I move that the file entitled "United States of America against Solomon Bernard Zissu, Number 45948," which is a file of this court dating back to 1943, be introduced as evidence in this case.

The Court: It may be marked as Defendant's Exhibit A-5 for identification.

(Clerk's File No. 45948, marked Defendant's Exhibit A-5 for identification.)

Mr. Pomeroy: Objected to as incompetent, irre-

(Testimony of Anne Johnson.)

levant and immaterial and having nothing to do with the issues in this case.

The Court: I don't understand what connection there is between that case and this one. [126]

Mr. Onstad: Your Honor, this Zissu was a known narcotic addict, not only known to the District Attorney but to the other men. He lived in the Caledonia Hotel and comes over to this girl's hotel for a month to rent a room either under the direction of the Narcotic Bureau or maybe some sinister purpose of his own.

The Court: When did he do that?

Mr. Onstad: He came in in March. She testified he came in March.

The Court: Does this file tend to prove that fact?

Mr. Onstad: The whole chain of circumstances that this defendant is entitled to prove—that this man was a known narcotic addict.

The Court: Do you offer the file to prove that the man was a narcotic addict as you charge?

Mr. Onstad: It shows that he possessed large quantities of opium and large quantities of Yen Shee. Also, I asked the Narcotic Bureau men if they knew him and they said, yes, they did, that they were familiar with him. But if you want any proof upon whether or not he was a narcotic addict I believe Mr. Pomeroy—

The Court: I believe no further statement is necessary at the present time. [127]

Mr. Pomeroy: If the purpose is to prove that



(Testimony of Anne Johnson.)

Mr. Zissu was a narcotic addict we will withdraw our objection, for that purpose.

The Court: Defendant's A-5 is now admitted.

(Plaintiff's Exhibit A-5 received in evidence.)

The Court: Let the record show all of the jurors have returned to their places as before and that all parties on trial with their counsel are present.

You may proceed.

Mr. Pomeroy: I wish to ask the defendant a couple of more questions, if your Honor please.

#### Recross Examination

By Mr. Pomeroy:

Q. Mrs. Johnson, you also signed an affidavit, didn't you, on your motion to suppress the evidence? A. Yes; I signed it.

Q. As a matter of fact, you signed that affidavit and you stated that you had known this man Zissu for a number of years? A. I did.

Q. How long prior to the time that you were arrested did you know him?

A. Well, the first time I met him was about 1932 or 1933. [128]

Q. Where was that?

A. I happened to be 'in—at that time it was called the Sahara Club here.

Q. In Seattle? A. Yes.

Q. Were you living in Seattle here?

A. Well, just came here, yes; I just happened to be visiting here.



(Testimony of Anne Johnson.)

Q. You were visiting here? A. Yes.

Q. How long did you visit here then?

A. I don't remember.

Q. Where was your residence at that time?

A. At that time I was staying at the Madison Hotel.

Q. Where was your home? A. Yakima.

Q. Yakima? A. Yes.

Q. Then you went back to Yakima from here, is that right? A. Yes.

Q. When was the next time that you saw Mr. Zissu?

A. Oh, once in awhile I saw him because I was up north most all of that time after that.

Q. You didn't see him up north? A. No.

Q. The only time you saw him was when you were here in Seattle? A. Yes.

Q. Did you also say in your affidavit that this suit case contained articles of men's clothing?

A. I just took it for granted. I never went through it either.

Q. In other words, the statement that you made in your affidavit that it contained men's clothing, you don't know whether that was true or not?

A. I don't know, no. I didn't look through it myself.

Q. How many different names have you gone under? A. I have only the one name.

Q. Which is that?

A. My maiden name, and another one. Through

(Testimony of Anne Johnson.)

business and trouble I just happened to use the name of Dwyer.

Q. Anne Dwyer?

A. Yes; for business reasons.

Q. What other name do you use—Anne Johnson, is that your correct name?

A. That is right.

Q. When did you first use the name of Anne Johnson?

A. Well, since I have been Mrs. Johnson.

Q. When was that? A. 1941, April. [130]

Q. In 1941? A. Yes.

Q. You have only used the two names, Anne Johnson and Anne Dwyer? A. Yes, sir.

Q. When did you start using the name of Anne Dwyer? A. The last war.

Q. The last war?

A. Yes; when everybody was prejudiced just because you had a little German blood in you. My own dad changed it.

Q. So you were known as Anne Dwyer from the time you were about eleven years old, is that right?

A. Yes.

Q. You have used the name of Anne Dwyer instead of Anne Johnson? A. Yes.

Q. Did you go by the name of Fern Johnson, too? A. No, sir.

Q. Did you use the name of Fern Johnson in Honolulu? A. No, sir.

Mr. Pomeroy: That is all.

Mr. Onstad: You may step down.

(Witness excused.) [131]

The Court: The defendant may call the next witness.

Mr. Onstad: I will call the defendant's mother.

**AMELIA DAUENHAUER,**

called on as a witness by and on behalf of the defendant, having been duly sworn, was examined and testified as follows:

**Direct Examination**

By Mr. Onstad:

Q. Will you tell the Court and jury your full name and spell your last name?

A. Amelia Dauenhauer, D-a-u-e-n-h-a-u-e-r (spelling).

Q. How do you pronounce that again?

A. Dauenhauer.

Q. You are the mother of Anne Johnson, the defendant here? A. Yes.

Q. Where did you live before you came to Seattle? A. In Yakima.

Q. How many years did you reside there?

A. Nineteen years.

Q. After you left Yakima you came here?

A. Yes.

Q. You came here somewhere around the first of November, is [132] that correct?

A. Yes.

Q. Where did you stay here after you came here? A. In my daughter's room.

(Testimony of Amelia Dauenhauer.)

Q. What room was that?

A. In the room she was in right by the stairway.

Q. Is that Room Number 1?

A. That is Room Number 1, yes.

Q. That is where she had her office?

A. Yes.

Q. How many months did you and your daughter sleep in that room, Number 1, in the three-quarter bed?

A. I don't exactly know, but I guess around six or seven months, about like that.

Q. After you quit sleeping there, where did you move to?

A. Oh, in the middle there, in those four rooms — laid on the couch there, stayed in there.

Q. What do your living quarters consist of there now in the hotel?

A. Two rooms.

Q. The first room is used for what?

A. Room 1; that is her office.

Q. I mean the rooms you now occupy.

A. Pardon me; that is Room 15.

Q. Do you use one for a kitchen? [133]

A. One for a kitchen and one for the bedroom.

Q. Do you and the defendant eat in there?

A. We eat there.

Q. And she sleeps in the other room, is that correct?

A. Yes.

Q. That Room 1, which you slept in, it has three glass panels, is that correct?

A. That is correct.

(Testimony of Amelia Dauenhauer).

Q. How wide are the panels?

A. About eight inches, I guess—something like that.

Mr. Pomeroy: Do you mean the door?

Mr. Onstad: The panels.

The Witness: The panels on the door.

Q. (By Mr. Onstad) There are three panels are there not and they are glass panels?

A. Glass panels.

Q. Did you ever smell any smoking opium around your hotel?

A. No; it couldn't be possible.

Q. Do you recall the Sunday before your daughter's arrest whether or not she was doing a lot of painting there? A. Yes.

Q. Tell the jury what she was doing.

A. She painted the stairway and laid the rugs. That day especially she worked hard. [134]

Q. How late did she paint Sunday night?

A. Oh, I guess until about 2:00 or 3:00 o'clock. I don't know exactly; I don't know exactly.

Q. Did she paint some on Monday morning.

A. She painted Monday morning until she left for Sears Roebuck.

Q. How long was she gone in the afternoon?

A. Maybe it was 6:30 or 7:00, something around there, you know.

Q. Did she have dinner with you that evening?

A. Yes, she had dinner with me.

Q. Did anybody else have dinner with you?

A. Just the other girl; Kay Doran.



(Testimony of Amelia Dauenhauer.)

Q. After dinner tell the Court and jury what happened.

A. She went in her room to feed her cats. She said she was going to have a rest. We told her to go and have a rest because she was very tired, from working hard. She painted and worked for weeks there. Between the time I was sewing and the other girl was washing dishes and then these guys come in. We didn't even know it until we heard a noise. So the girl came out and they grabbed her. They asked her if she smoked some of that stuff. She didn't know anything about it. I never knew anything about it either so I thought I had better see what was going on because [135] I heard a little bit. I just put my head out and he grabbed me by the arm and he said, "Come on." I said, "What do you want with me?" He said, "Come in here."

The door was open and the guys were in there. I got excited and I started in crying. I didn't know anything about it.

Q. Do you know whether or not your daughter has ever used any smoking opium or any other narcotics?

A. No; I could swear—never as I know did she ever use anything or was at any time mixed up.

Q. Did you smell anything around the room there that night that was unusual?

A. I never did.

Q. Did the officers have any conversation with you about whether or not you smelled anything there?

(Testimony of Amelia Dauenhauer.)

A. One officer said, "Don't you smell anything?" and I cut him off. I said "I don't smell anything except incense." We burned incense,—always do on account of the cats. And you know, the smell, people like to have it clean. People come up every few minutes.

Q. Your husband died some years ago, did he not?  
A. Yes, eight years ago.

Q. How big a family do you have?

A. Nine children; seven boys and two girls. [136]

Q. How many reside in Washington now?

A. Three boys besides my daughter—four.

Q. Do you know how long the officers searched around that evening.

A. I guess forty-five minutes or something like that; you know. It is hard to tell; that is as close as I can say.

Q. Had you been in this room a couple of times during that day?

A. Yes. I went in to feed the little kittens. We had five or six little kittens. It is kind of funny but we did.

Q. You and Mrs. Johnson do all of the chambermaid work around the hotel there?

A. Yes, most of it.

Q. You keep up the halls?  
A. Yes.

Q. Is this room 1, where the people come to pay their room rent?  
A. That is right.

Q. Do you know how many people were living in the hotel?

(Testimony of Amelia Dauenhauer.)

A. Around thirty or thirty-five; I wouldn't really know.

Q. Were people coming and going there all the time? A. That is right.

Q. Room 1, where your daughter sleeps, is not very far from [137] the head of the stairs, is that right? A. Yes, that is correct.

Mr. Onstad: That is all.

### Cross Examination

By Mr. Pomeroy:

Q. Room 1 is not connected with any other room, is it? A. No.

Q. Just a room by itself?

A. Just a room by itself.

Q. Just the hall on one side?

A. On one side.

Q. There is no connecting door with any other room? A. No.

Q. Those glass panels, can you see through them?

A. Well, a little. They are loose. There is nothing to it.

Q. They are what? A. They are loose.

Q. Can you see through them?

A. A little, you can, yes.

Q. What do you mean, in the joints of the panels?

A. No, when you look good you can see through it a little bit. [138]

Q. Are they painted over?

(Testimony of Amelia Dauenhauer.)

A. I don't think they are painted. Just—what is it—that silver is on it, something like that.

Q. It is glass that is painted over, is that it?

A. That is the way it was when she took it over.

Q. Can you see through it?

A. Well, I guess if I stand close enough I can, yes, a little in one corner you can see through it.

Q. If you stand close enough and look a little bit in one corner you can see through it?

A. Yes.

Q. Is it painted over? A. No.

Q. What is it that prevents you from seeing right through it then?

A. I don't know. That is the way it was when she went in there and took it over. It still is the same.

Q. Is it frosted glass?

A. I don't know. I can't answer that question.

Q. You say they are glass panels. What is it that keeps you from seeing through there?

A. I don't know. I guess it is that silver on there. If you stand close you can see through a little. You can see people are in there and people are outside.

Q. Shadows or something,—could you tell who was out there? [139]

A. I guess you could. I don't really know.

Q. You don't know what the smell of smoking opium would be like, do you?

A. I never knew what it was in my life.



(Testimony of Amelia Dauenbauer.)

Q. You wouldn't know what it was if you did smell it, would you? A. No.

Redirect Examination

Br. Mr. Onstad:

Q. I came up there yesterday, did I not, to examine the premises? A. Yes.

Q. We did examine the window in the middle pane there? A. Yes.

Q. And you remember that I had some idea—  
Mr. Pomeroy: I object to that.

Mr. Onstad: If you want to send a man up there—if there is any doubt about this window and that you can see through it by looking carefully, I will be glad to stipulate that Counsel can send a man up there and look through it.

The Court: Proceed.

Mr. Onstad: That is all.

(Witness excused.) [140]

The Court: Call the next witness.

Mr. Onstad: Mrs. Waltz.

MRS. RETA M. WALTZ

called as a witness by and on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Onstad:

Q. Will you tell the Court your full name, please.



(Testimony of Mrs. Reta M. Waltz.)

A. Mrs. Reta M. Waltz.

Q. What is your occupation?

A. I am a nurse.

Q. A Registered Nurse? A. Yes.

Q. How long have you been such?

A. Let me see; I worked for my husband eighteen years. I worked for Dr. Anderson two years, and Dr. Greiner a year.

Q. Are you employed at this time?

A. No, I am not. I have been ill.

Q. How long have you lived there at the Europe Hotel?

A. Oh, I would say three or four months. [141]

Q. How many times a day do you come in and out of that hotel?

A. Oh, my, I go to the grocery store and come back and take walks and come back. I probably go down half a dozen times a day or more. Then I go down and visit with her mother and her.

Q. Do you have a cooking apartment there?

A. It is a housekeeping room.

Q. So you have your meals there, most of them?

A. I do.

Q. Does anybody else live there with you?

A. Yes; I have a room mate.

Q. I will ask you to state whether or not you were living there on the 18th of April of this year?

A. I don't believe I was.

Q. When did you come there to the hotel?

A. It seems to me it was two or three months ago. I was very ill at the time and couldn't find

(Testimony of Mrs. Reta M. Waltz.)

an apartment. She was kind enough to get one for me.

Q. You weren't there at the time she was arrested then?

A. No. I had seen her though.

Mr. Onstad: She may be excused. I understood that she had been there longer than that, your Honor.

The Witness: I have know her longer than that. [142]

Q. (By Mr. Onstad): Have you known Mrs. Johnson a long time?

A. Oh, yes; I used to live a few blocks away and used to go over there all of the time.

Q. Have you visited her at the hotel before you became a roomer there?

A. Yes; every time I would go out for a walk, nearly every day.

Q. You have seen her how often the last how many months?

A. Ever since she has been in the hotel.

Q. The last two ~~years~~, would that be correct?

A. Yes.

Q. Do you know whether or not she has ever used any narcotics of any kind?

A. I don't see how it would be possible.

Q. Have you in your medical profession associated at times or had occasion to see people who used narcotics? A. Yes, we have.

Q. Have you ever seen any traces on Mrs. Johnson at any time? A. Never.

(Testimony of Mrs. Reta M. Waltz.)

Mr. Onstad: You may cross-examine. [143]

Cross Examination

By Mr. Pomeroy:

Q. How long have you been a nurse?

A. I am fifty-one years old. I think I was about eighteen or nineteen when I finished.

Q. You have been practicing your nursing profession ever since then? A. I have.

Q. Have you treated narcotic cases?

A. No.

Q. You have never treated any?

A. No. We have had them in the office but I have never treated any because we were specialists.

Q. In what? A. Eye, ear, nose and throat.

Q. Do you know anything about opium or smoking of opium; would you take a look at that exhibit number 3 up there; could you tell me what it is?

A. I would know what it was, yes. My intelligence would tell me that. I know what it is for or I think I know what it is. But my experience has mostly been with people that have used morphine and cocaine or things like that. We have had smokers, because we have had a lot of Chinamen for patients.

Mr. Pomeroy: That is all. [144]

Mr. Onstad: That is all.

(Witness excused.)

Mr. Onstad: I will call Mr. Hutchinson.

## JOHN THOMAS HUTCHINSON

called as a witness by and on behalf of the defendant, having been duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Onstad:

Q. Will you tell the Court and jury your full name please?

A. John Thomas Hutchinson.

Q. How old are you, Mr. Hutchinson?

A. Fifty-nine.

Q. What has been your occupation?

A. Marine Engineer.

Q. How long have you been a marine engineer?

A. I have been a marine engineer forty-three years.

Q. Do you go to sea? A. I do, yes, sir.

Q. Have you had any experience on boats with people who smoke opium?

A. I have had quite a bit of experience years ago, yes. [145]

Q. Do you know Mrs. Johnson here?

A. I do.

Q. How long have you known her?

A. About eight months.

Q. How many times have you visited up at the hotel?

A. Oh, I would say about fifteen or twenty times.

Q. Do you know her mother, too?

(Testimony of John Thomas Hutchinson.)

A. I do. I met her when she first came over here.

Q. During your years of experience on the boats, did you come in contact with many people who smoked opium?

A. We used to haul Chinamen to Alaska years ago, and they all smoked opium, yes, sir.

Q. How many years did you have occasion to notice people who smoked opium?

A. Well, I don't know, about four years I guess.

Q. Do you think you know the indications of a person who smokes opium, if you saw it?

A. Well, I might not tell the person but I could tell the smell of opium.

Q. Well, have you ever smelled any opium around the Europe Hotel?

A. No, I haven't.

Q. You were not there on the 6th of April?

A. No, I was not.

Q. Have you ever been there previous to that time? [146]

A. This last April?

Q. Yes.

A. Yes, I have been there previous to that, yes.

Q. Would you say that at any time you have ever seen Mrs. Johnson that she ever showed any signs of using any narcotics like that?

Mr. Pomeroy: I object, if the Court please, that the proper foundation has not been laid that this man is an expert to make any such comment. I object to the question.

The Court: The objection is sustained. The situation here is different from that of the pre-



(Testimony of John Thomas Hutchinson.)

ceding witness. The preceding witness was a Registered Nurse as I understood it.

Mr. Onstad: Of course, this witness was on these boats for a good many years, and had actual observations.

The Court: The ruling will stand.

Q. (By Mr. Onstad): You do know from your experience on boats the smell of opium?

A. I would, yes.

Q. Have you ever at any time smelled any opium around the Europe Hotel?

A. I never have, no, sir. [147]

Mr. Onstad: You may cross examine.

### Cross Examination

By Mr. Pomeroy:

Q. When was it you took these Chinamen to Alaska? A. 1906.

Q. Out of which port did you go at that time?

A. Seattle.

Q. Out of Seattle? A. Yes, sir.

Q. What ship or ships were you on at that time?

A. Well, I have been on the Victoria.

Q. On that in 1906?

A. Yes; that was 1906.

Q. What was your position on the Victoria at that time?

A. I have forgotten—I think I was a waiter at that time.

Q. What other ships at that time?

(Testimony of John Thomas Hutchinson.)

A. I was on the Santa Clara and the Bertha.

Q. On the Santa Clara? A. Yes, sir.

Q. And what other ship?

A. The Saratoga.

Q. What steamship line did they belong to, the Santa Clara and the Saratoga?

A. Alaska Steamship Company, I think it was.

Q. What was your occupation on those ships?

A. I was an oiler on the Saratoga. I was a night watchman on the Santa Clara.

Q. Do you know how old you were at that time?

A. I think I can tell you.

Q. How old were you?

A. Probably seventeen or eighteen; probably eighteen years old, I guess.

Q. All of the Chinamen smoked opium, is that your statement?

A. A great many of them smoked it. I didn't count them.

Q. You said all of the Chinamen smoked opium before, didn't you?

A. Just about, yes. I have seen them by the hundreds down in the holds smoking opium.

Q. Were you a way down in the holds?

A. I had business to go down there.

Q. What was your business down in the holds?

A. Lots of business.

Q. What business would a waiter have down in the holds of the Victoria, for instance, with the Chinamen?

A. I don't know, we used to go down there any-

(Testimony of John Thomas Hutchinson.)

way. I don't think there was any of the crew that didn't go down through the holds.

Q. All of the Chinamen smoked opium? [149]

A. I don't know how many of them but a great many of them did; hundreds of them.

Q. Did they have opium like you see there?

A. They had opium.

Q. Take a look at Exhibit 3 and see if that is the kind of stuff they had?

A. I don't know. How can you see—it is closed.

Q. Well, open it up.

A. Yes, it looked similar to that; not exactly, no.

Q. Do you see that pipe there?

A. I never saw anything like that before, no.

Q. What kind of pipe did you see?

A. Regular opium pipes that they used.

Q. What did they look like?

A. A long stem with a bowl on it.

Q. Did every Chinaman carry one of those to Alaska with him?

A. No, not every Chinaman didn't.

Mr. Pomeroy: That is all.

Mr. Onstad: That is all.

The Court: Step down.

(Witness excused.)

Mr. Onstad: We rest, your Honor. [150]

The Court: Is there any rebuttal?

Mr. Pomeroy: Mr. Stewart.

The Court: Come forward.

**ROBERT STEWART,**

called as a rebuttal witness by and on behalf of the Plaintiff, having been duly sworn, testified as follows:

**Direct Examination**

By Mr. Pomeroy:

Q. Will you state your name to the Court?

A. Robert Stewart.

Q. Your occupation?

A. Chief United States Probation Officer for the Western District of Washington.

Q. Do you know Solomon Zissu?

A. I do.

Q. How long have you known him?

A. I have known him since I returned from the Service in 1944.

Q. What association did you have with Solomon Zissu?

A. I saw him approximately twice a month. Once a month he would come in and make a report and other times he [151] would drop in and say hello to me.

Q. What was your association? Why did he come in to see you?

A. He had been placed on probation by Judge Levy in Seattle.

Q. He was placed on probation the 21st of September, 1943, is that correct?

A. That is right.

Q. How long was he to be on probation?

(Testimony of Robert Stewart.)

A. A period of five years. His probation would have expired on September 21, 1948.

Q. If he had violated that probation as to smoking opium, what kind of a sentence was he subject to?

A. He was sentenced for a period of five years.

Q. Where?

A. To an institution to be designated by the Attorney General of the United States or his authorized agent.

Q. Do you know whether or not as far as you know that he had touched any narcotics while he was under probation and under your jurisdiction?

A. To the best of my knowledge he would not. If he had of I certainly would have asked the Court for his revocation because placed on the bottom of our copy of judgment and sentence is the note, "Court made a special note that the defendant is to be brought into [152] the Court if he returns to the use of narcotics."

Q. He did suffer from disease, didn't he, the latter part of his life?

A. The man was a very sick man.

Q. What was wrong with him?

A. He called at my office—

Q. What was wrong with him?

A. He died of a coronary heart disease.

Q. What was the illness he was suffering from the latter part of his life?

A. He also had tuberculosis.

Mr. Pomeroy: You may cross examine.



(Testimony of Robert Stewart.)

**Cross Examination**

**By Mr. Onstad:**

Q. He resided at the Caledonia Hotel, isn't that correct?      A. That is right.

Q. And he resided at the Caledonia Hotel all of the time he made his reports, did he not?

A. His reports showed he resided at the Caledonia Hotel.

Q. When was the last report from him?

A. The last report I saw from him was on April 3, 1946.

Q. When did he die?

A. He died April 29, 1946, at 2:58 p.m.

Q. Then so far as you knew, the last time you saw him he [153] was a very sick man?

A. May I explain that?

Q. Yes.

A. I know that the man was a very sick man because at the time he called at my office he asked for permission to go to Arizona. That was last winter. I asked what seemed to be the trouble and he told me that he was suffering from tuberculosis and that Dr. Grinstein was his doctor.

I contacted Dr. Grinstein and Dr. Grinstein said that the man was a very, very sick man. As a matter of fact, the day he died he had an appointment at 3:00 o'clock in the afternoon to have a cardiograph taken of his heart.

Q. You say the last time was the 3rd of April that you saw him?      A. That is right.

(Testimony of Robert Stewart.)

Q. Did he say anything about going to Soap Lake or anything like that to you?

A. No, he didn't.

Q. He said he was going some place, didn't he?

A. No, he didn't at that time.

Q. He didn't?

A. No. I also saw him a few days before on the street.

Q. He didn't tell you that he rented a room at the Europe [154] Hotel? A. No.

Mr. Onstad: That is all.

Mr. Pomeroy: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pomeroy: The Plaintiff rests.

Mr. Onstad: The Defendant rests.

(Discussion off the record as to further proceedings in the case.)

The Court: Further proceedings in this case will be continued until tomorrow morning at 10:00 o'clock.

The jury will remember and heed the Court's previous admonition against discussing this case with anyone and against permitting anyone to discuss it with you.

Avoid reading accounts of it in the newspapers and avoid comments about it on the radio.

Court is now adjourned until tomorrow at 10:00 o'clock.

Mr. Onstad: If your Honor please, I renew my motion.

The Court: The motion is denied.

Mr. Onstad: The record may show that the defendant renews its original motion in the case—

The Court: It would be better if Mr. Pomeroy were here.

Mr. Onstad: Your Honor, at this time I move for a directed verdict and challenge the sufficiency of all of the evidence of the Government on the grounds and for the reason that there hasn't been sufficient evidence in this case, and second for the reason that the said search and seizure by the agents of the Government, the Federal Bureau of Narcotics, was in violation of the defendant's constitutional rights and in violation of Article IV and Article V of the Constitution of the United States.

The Court: The challenge is overruled and the motion is denied.

Mr. Onstad: Exception?

The Court: Allowed.

(At 4:10 p.m., Tuesday, July 23, 1946, Court recessed until 10:00 a.m., following day, Wednesday, July 24, 1946, in the United States Court House.) [156]

Seattle, Washington.

Wednesday, July 24, 1946, 10:00 a.m.

(All parties present as before.)

The Court: Will the record show roll call of the jury waived and that all of the jurors are present and also all parties on trial with their counsel.

Members of the jury, it remains now only for counsel to argue the case and later for the Court to instruct the jury and finally submit the case to the jury.

The Plaintiff has the opening and closing argument and in between those will occur the Defendant's argument.

Counsel in arguing may take any position in the court room most convenient and agreeable to them.

At this time we will have the Plaintiff's opening argument. [157]

### PLAINTIFF'S OPENING ARGUMENT

Mr. Pomeroy: If the Court please, Counsel, and ladies and gentlemen of the jury:

We have approached this stage in easy steps. I think the argument will be rather short.

There are four counts to this indictment as was explained to you yesterday. The indictment, of course, will go to the jury room with you to indicate what the actual charges are. However, briefly, Count I charges that Anne Johnson, alias Anne Dwyer, purchased approximately eighty-five grains of opium prepared for smoking which was not then

in or from the original stamped package. That is Count I: That refers directly to the eighty-five grains which is contained in Plaintiff's Exhibit Number 3.

I have forgotten exactly how many grains this bottle will hold but most of you can see that eighty-five grains is not a great deal of opium, which is in the bottom of this bottle.

And, of course, there are no stamps whatever on the bottle. That is part of the charge, since this is a Revenue Act—not then in or from the original stamped package—and there is no stamp on this at all. [158]

Count II charges that on or about the 8th day of April, 1946, at Seattle, Anne Johnson, alias Anne Dwyer, knowingly received and concealed eighty-five grains of opium prepared for smoking which opium had theretofore been imported and brought into the United States of America contrary to law, and Anne Johnson knew said opium had been so imported. That is under a different Act, and that charges a crime of concealment after illegally importing opium:

In the Court's Instructions to you he will probably tell you that the presumption is that when you find a person with opium it is presumed to have been illegally brought into the United States, unless that person explains to your satisfaction that the opium was not illegally brought into the United States.

Of course, there is nothing in this or nothing in the evidence to show that this opium was brought



in by legal or lawful means. Now, those are the two counts on the two different acts involved in this case. There are two more counts, Count III and Count IV, but they are exactly the same acts and charge the same things and have reference to the yen shee.

Now, the yen shee which the evidence discloses was found on the tray and in this bottle—these two together—approximate about forty grains of yen shee, [159] which is partially-smoked opium.

As one of the witnesses testified yesterday, yen shee can be used over and over again until all of the good is gone out of it. They resmoke it.

Now, as to the facts of the case, you heard the testimony of the officers that they smelled opium, went up to Room Number 1, which was the room occupied by the defendant; that they went in and found this whole set there under the covers of the bed.

Under the defendant's own testimony she is guilty of concealing, after illegal importation, because she herself has said that she took it out of the suitcase.

If you will recall, she signed an affidavit and on the stand stated she had taken it out of a suitcase which contained men's clothing. Then when she took the stand yesterday she said she didn't know what was in that suitcase outside of the opium kit although previously she had signed an affidavit that there was men's clothing in the suitcase.

But after she heard the testimony of the officers—and I don't think that anybody should doubt the

word of the officers—that this suitcase contained women's clothing. In other words, she changed her testimony after she heard the testimony of the officers [160] on the stand. She claims that this belonged to another man. That man has been inserted into this case after he died. That is why this other case was brought in that he was a convicted narcotic addict, and that he had been on probation reporting to the United States Probation Officer here ever since 1943; that he died of a heart attack and was suffering from tuberculosis at the time of his death. He was making regular reports. Had he been an addict during the time that he was on probation, of course, why, the 5-year sentence under which he was on probation would have been imposed and he would have gone to the penitentiary for it.

However, the probation officer could find no evidence of his having been an addict since the time he was convicted in this court.

However, he is an old, old-time friend of the defendant and loaned her six hundred and fifty dollars under her testimony to purchase this Europe Hotel, this rooming house—gave him no security for it, just took the six hundred and fifty dollars.

She claims that was his suitcase. However, it was full of women's clothing. I don't know yet what connection her counsel will make with the fact that Zissu's suitcase was full of women's clothing. It was a very convenient death, when he died, [161] because then she comes in and changes her story

and says this belonged to Mr. Zissu, who died and left it in her possession.

However, she says she didn't have a chance to explain before now how it was this was found in her room. She sat on the bed, covering up the opium. And the officer asked her about it. If she ever had a chance to explain, it was there. Later she said she was taken to the jail, to the Police Officer's office and there given another chance to explain. But, no, she didn't explain then.

I cannot conceive of where she never had a chance to explain this before now. But, of course, after Mr. Zissu died and he couldn't be brought here, nor he wouldn't be to testify, it was his. Then, she could say, this belonged to some other party.

Her story does not hold together.

Incense, she says she was burning, and that that was the strange odor, or the cats in the room. That is an old gag of narcotic addicts and has been for a long, long time, burning of incense. But the officers testified before you, and I think you will believe them, that the odor of opium is distinctive and one you will never forget once you have smelled it. The burning of incense is only to fool other people. Suppose someone [162] such as you or I had gone into the Europe Hotel and smelled something funny in the halls. We are not experienced with narcotics and the natural explanation to us would be that it was some sort of incense. We would say to ourselves, "Well, that is rather odd smelling incense; I wouldn't want that around my

house." But that is the old gag of a narcotic addict.

I didn't bring out the fact that she had been convicted of another crime and try to prove to you that she was guilty of this crime because of a former conviction, the conviction of transporting a woman for immoral purposes, but only to show you that her credibility could be attacked.

I think in that very instance when she testified as to that, it does show that her credibility can be attacked successfully by anyone who does question her.

If you recall, she stated that she was not guilty. However, she pleaded guilty. Then she went on to say that the prosecuting attorney up in Alaska had said she was not guilty and didn't want to prosecute. Well, for heaven's sakes if he didn't want to prosecute, why did she go in and plead guilty—just because she wanted to receive a sentence? The story doesn't hang together and is ridiculous.

As to Count II and Count IV that is the concealment—she knew even under her own story on Counts II and IV, that that opium was in that suitcase, which she claims belonged to somebody else. But at least she knew it was there. So after she knew it was there—and officers were outside—she claims it was "Mayor Devin." I don't know how you can mistake "Mayor Devin" and "Lieutenant Belland"—and four officers testified it was Lieutenant Belland.

She concealed it under her bed covers.

So, under Counts II and IV, under her own story, she is guilty of those two counts.

Here she went up to her own room at an early hour. She says she was tired. That is perhaps true. But she was only going to go to bed for a couple of hours. She was not going to go to bed to sleep all night. And that was the time they smelled the burning opium, when she went to bed in the early evening for a couple of hours—not when she was going to go to bed for all night and get up in the morning and work again. She only went to bed for a couple of hours. And the main thing is that this pipe, when the officers found it, was still warm. You can take that pipe and pass it around. You know that that bottle which is a makeshift opium pipe wouldn't stay hot for very long or even warm.

The fact that that pipe was hot, as these [164] officers testified, shows that that pipe was used a short time before the officers came to that room. She was there using that pipe at that time. There is no testimony that anyone else was in that room for some period of time prior to the time the officers came.

I believe that one of the officers testified that the pipe wouldn't stay hot, or that that glass wouldn't stay hot longer than about fifteen minutes.

I think that when her story is analyzed by yourselves, the story about the suitcase, the fact that she falsified when she signed an affidavit that there were men's clothing in the suitcase, the fact that she falsified in other instances in this case proves



beyond a doubt that she is absolutely guilty of all four counts of this indictment.

I would like to say this, ladies and gentlemen, without taking any more of your time:

The narcotic traffic is a viscious traffic and you people and most of the good people of the community know nothing about it. We don't run into it very often but when we do run into it, it is our duty to stamp out the traffic in narcotics. It is a viscious habit. Even the addicts themselves know that they are not getting any good from it. Some of them come in voluntarily and ask to be cured of this terrific habit which eats out [165] their systems and their moral systems as well as their physical systems. I say to you that this defendant is guilty and should be convicted on all four counts and wipe out this narcotics traffic as much as we can.

### FINAL ARGUMENT FOR DEFENDANT

Mr. Onstad: I agree heartily with Mr. Pomeroy about the wiping out of narcotics. I have never tried a narcotics case in my life before.

I have been appointed by the Court two or three times to defend some poor weak-minded wreck who has been found guilty of narcotics. I have been appointed on those cases by the court. I have no use for anybody who uses narcotics and I believe that they are just the same as anybody else who becomes addicted to the intoxicating liquor habit—that they should go to a hospital and get cured. If they have their own private means they should go

there themselves. If they haven't, it is up to the government to put those people where they can be cured, because they are not only dangrous to themselves but dangerous to our community due to the fact that most of them, if they can't get the money themselves, will go out and become perpetual shop-lifters and pick-pockets. Many of our eminent safe-crackers are men who get geared up on morphine and are able to click those things in the safe. So what Counsel says about that goes for me, too.

I am going to mention this first: A number of years ago I tried a case in this court and the jury brought in a verdict of Guilty. It was two or three years later I met a young chap who had been on that jury. He said, "I am glad to meet you." "You know," I said, "I am also interested to talk to someone who was on that jury to find out how they convicted him."

Mr. Pomeroy: I object to that as having nothing to do with this case.

Mr. Onstad: I can tell them what happened in another case. I can quote the Bible or wave a red flag or do anything else.

The Court: The Court will not exclude the so-called analogy. The jury, however, is reminded that it is for the jury to recollect the evidence in this case and to pass upon that—to consider that as the guiding principle in this case. Whatever may have been the situation or the facts in some other situation is not controlling in this case.

Mr. Onstad: No.

The Court: The jury will kindly bear that [167] in mind.

Mr. Onstad: This has nothing to do with this case except for illustratiye purposes.

Mr. Pomeroy: I am reminded a short time ago when the entire Tom Mooney case was gone into. We should limit our argument to the facts in this case.

The Court: I believe that what the Court has said will cover it. The jury will lay out of their mind anything that Counsel say that is not supported by the evidence in this case.

Mr. Onstad: Anyway, this chap said, "Well, we looked around the court room and we saw the friends who visited this fellow. We decided if he had such friends that he must be guilty. As a matter of fact, we didn't have anybody in the court room, and the court room was filled with the FBI, and there were three or four other Bureaus involved in that case just like in this case. Yesterday there was a whole group of Federal Narcotic Agents here who didn't testify. Whenever these men get off the stand, when ever I have kicked a loophole in their case, they take him in the hall for the next witness to bolster it up.

Mr. Pomeroy: If the Court please, I object.

Mr. Onstad: It is true, and if you will sit there a moment I will show you what happened. [168]

The Court: The Court feels there is nothing in the case which justifies this comment and the jury will disregard it.

Mr. Onstad: Lieutenant Belland testified yes-

terday that this suitcase had men's clothing in it. And that is the reason I cross examined the witness about the suitcase thoroughly. After I had cross examined the first two witnesses, the next one came in and said, oh, yes, this was a woman's suitcase and had women's clothes in it. Bear in mind this woman had been occupying this room for two or three years. According to Officer Goode they went through lingerie, silk stockings, and many other beautiful articles in the suitcase, and, on top of it it had this outfit with a greasy, oily can and many other things that would have spoiled those articles.

Do you think this woman would have lived in this room two or three years and kept fine lingerie on the floor when she had a residence there? It doesn't make sense. If it had been women's clothes in that suitcase they would have brought it in. But they didn't dare bring the suitcase in because it had men's clothes in it and they would have been guilty of stealing and they didn't have a search warrant. Two of them said it was men's, and the last two said it was women's [169] clothes. Why? Because they saw the case falling to pieces.

The District Attorney, Mr. Pomeroy, in this case, the first statement he made yesterday was this: He said, "Lieutenant Belland and other narcotic agents were going to the Europe Hotel to make an investigation of a quantity of opium which had been sold there. And Lieutenant Belland reiterated a small amount on that part and then the other agents refused to say they had any knowledge. One of the last questions I asked Mr. Goode was, "Did you

know anything about this large sale of narcotics that was going to be sold in the Europe Hotel?" He said, "No, we didn't have that in mind at all." Where did that come from? Somebody must have sold it to Mr. Pomeroy, that they were going to the Europe Hotel to make investigation as to a large quantity of narcotics which had been delivered to the Europe Hotel.

Then we further find this: At which I was very, very surprised in this case to find out how they shifted their stories and gyrated around here like a weathercock in a whirlwind all day yesterday. Then Lieutenant Belland gets on the stand and says this Odekirk who is an informer, came down and told him sometime earlier that evening that there was somebody smoking opium there [170] at the Europe Hotel, and that he picked them up at Fourth & Cherry and drove up to the Oxford Hotel which is a block away from the Europe Hotel, and he let Odekirk out. That must have been 7:00 or 7:45. And that Odekirk went into the Europe Hotel and came back and said, yes, he could smell the fumes of opium there.

Then he got back in his car and let Odekirk off at his place of business and then drives down to Sixth and Jackson to get in touch with the narcotics squad.

Now, Lieutenant Belland is a police officer of the City of Seattle. The City of Seattle have a Narcotics Bureau, and so does our State have a Narcotic Bureau, and so does the Federal Government have a Narcotic Bureau. If he makes an arrest he



can prosecute that person in Police Court and in Superior Court and in Federal Court for the same violations.

This woman can be charged not only in this court but in two other courts besides for this same violation, and it is not out of jurisdiction. Each court has jurisdiction.

Why did Lieutenant Belland, who is a representative of the people of the State of Washington, go down and get the Federal Narcotic Bureau in this case—if this wasn't going to be a big case, something more than [171] a little ordinary person smoking opium as they say in a 9-by-12 room, with no means of destruction of the property.

There wasn't even a lavatory in the room. There was no other door. Like Mr. Pomeroy asked yesterday, "Wasn't there another door there you could have gone out of?" This little room was a trap there. If anything went out of it, it went out on First Avenue. The officers watched the window and the room, every bit of it. You couldn't even move in it in all probability. As a matter of fact, you could look out of the glass door, and one place the frosted glass had been there so long the frosting had come off and you can see in the room, not too distinctly, but you can see in the room.

Why did he go down to First and Jackson and get in touch with the Federal Narcotic Agents?

Now, ladies and gentlemen, I don't know a thing about the Narcotic Bureau of the City of Seattle, nor of the Federal Narcotic Bureau, not having

had any dealings of any consequence with either one of them.

However, I have been an Acting Police Judge in the City of Seattle for two years and I know how some of the departments down there operate.

Now, why were all of the prowler cars, with the Seattle Police Department having three or four hundred [172] men in it, men on the beat, men patrolling your city, if you have an accident, a prowler car will be any place in the city within two or three minutes. We have our Robbery Squads; we have our Burglary Squads; Moral Squads; and Narcotic Squads; why, did he go down there to get in touch with them if it wasn't going to be a large case?

Do you think that the Police Department of the City of Seattle has to go out and call up the Federal Narcotic Bureau to go out and arrest some little opium smoker in a hotel?

We have a good Police Department in this city. We have one of the best robbery and morals details in the whole United States, and I am proud of the work that those boys are doing. There isn't a one of them I wouldn't defend with the last ounce of my life if they got in trouble because I know how they are.

But why did Lieutenant Belland go down there, when we have a very, very efficient Police Department?

He thought it was going to be apparently a very large case.

Do you think that our Police Department have

to go down and get the Federal Bureau of Narcotics to make an arrest of some poor little weak-minded—when the body is almost rotten to the core—to make an arrest? [173] If our Police Department was that weak, our streets would be full of drunken drivers, women wouldn't be safe on the streets, and our banks and money and property in this town wouldn't be worth the bother to blow it to heck.

You know that is true, definitely true. But why did they do it? I don't know. All they did was search the suitcase and come in and testify that a woman had been living in a room for two years and is still living out of her suitcase.

I ask you this: I asked the officers yesterday about fingerprints. I knew they took the fingerprints—I wanted you to know that in every case they take fingerprints.

It is admitted by the Government, and not denied, that they took this woman's fingerprints.

Don't you think that if they examined this tray, after they took her fingerprints, and found her fingerprints on this tray or if they had many of them they would have told you about it? If our Police Department had had this case and this case was being tried in Superior Court, fingerprints would have been given in this case and the fact it was not given shows beyond any doubt that her fingerprints are not on this, and the fingerprints are probably Zissu's. [174]

Another thing that happened yesterday—I am ashamed of a Bureau which investigates cases like this Bureau investigated this case. They said this

pipe was hot. And I was very careful to ask them in an indirect way because if I had mentioned it, they would have had one or two witnesses come back and testify that this was not too hot. I didn't ask anything until Mr. Goode,—or Mr. Graben, who was the last witness, I asked him, "You examined all of these articles here?" He said, "Yes." I said, "Well, how long does it take a bottle to get cooled off after you heat it?" He said, "About ten minutes." I asked him about the search and he said, "We found it after ten or fifteen minutes' search, and he still said the bottle was hot.

I submit to you, ladies and gentlemen, that I don't know just how this contraption operates but Lieutenant Belland testified that he took this can and it had oil in it—it was full of oil—and they poured that oil out in the sink.

Now, I submit to you, as reasonable men and women, who know something about mechanics and there are probably men on this jury who know a great deal more about mechanics than I know or ever would know without studying it—but you know a little bit about it from common sense. If you had a little can full of oil and heated [175] oil and this is the thing that is producing the heat to smoke the opium and full of oil at the time, don't you think that a can full of hot oil which had been burning, causing the heat to a bottle which is almost like a baby bottle—you know how quick they get cool, compare the two in your mind. Here is a solid metal can, full of hot oil according to the testimony of the officers, and an empty bottle. This was hot. This was cold.



Look at the stuff! It has been used for a long time! And this thing here too; this certainly would have retained heat a lot longer than a bottle would, if I know anything about metal, and furthermore, look at the place where she was living up there. A room with three panels of glass. No avenue of escape. No way of destroying these articles that she had here. No way of disposing of them. Don't you think if she was a dope addict that she would have thought something about the fact that—according to the officers you can smell opium while you are smoking it and smell it for hours afterwards; it doesn't leave,—it just sinks down and forms a horrid cloud that they can smell for a long time after anybody smokes.

Here she is living in a First-Avenue Hotel on Stewart Street, people coming and going in the place, not only the people in the hotel but guests of the people [176] living in the hotel,—that if she was smoking opium, and the very stench that these officers said was evident twenty-two stairs down below and just lead right up to Room 1,—do you think that any person who is an opium smoker would smoke in such a conspicuous place as that and make a stench as soon as you entered the place, in her own hotel where she has got all the money that she has got in the world invested? I just can't see where that adds up one, two, three. It is just like nothing, from nothing is nothing; and nothing plus nothing is nothing. And that is the way the Government's case adds up in this matter.



Mr. Pomeroy says they changed her testimony in this case—that she had filed an affidavit.

On the 26th day of June I filed an affidavit which was almost a month ago today. Since he has brought it up, I want to read it to you. She hasn't changed her story one bit, and she told the Government what her defense was over a month ago. Before we even knew about Mr. Odekirk and his connection with the case, having been up there as to the time.

Just listen to this affidavit here,—I am not going to read all of it because it is not particularly important.

“\* \* \*. Affiant then dressed and [177] and unlocked and opened the door and four men came in who she later found to be police and federal narcotic agents. Affiant asked them what they wanted and one officer stated, “You'll find out”; and the other officers were already starting and proceeding to search the room and property of affiant; that said sleeping room was a very small room about nine feet by twelve feet and said officers searched everything in said room for a period of approximately forty-five minutes and they found a paper sack in affiant's bed which contained an opium bottle, pipe, and opium, the quantity which is unknown to affiant. That the Yen Shee was found in a man's suit case which contained articles of men's clothing and it was loose and being mixed with clothing therein contained; that five days before affiant's arrest she took a suit case belonging to Solomon B. Zissu who had occupied Room 20 of affiant's hotel

for four weeks down to affiant's Room 1 as Mr. Zissu called affiant on the phone stating he was giving up the room and would call for his suit case Saturday, which would be April 6th; that affiant looked in the suit [178] case and saw what appeared to be an opium outfit; that affiant knew Zissu for a number of years and that he had befriended affiant and had loaned affiant \$650.00 to help purchase the hotel where she was arrested; that Mr. Zissu was a sick man and told affiant that it was necessary for him to take a pill of opium quite often for his heart; that Mr. Zissu did not come Saturday and came Monday about 7:30 and asked affiant for the key to her room and that affiant gave him her key and then affiant went to her mother's apartment in said hotel for dinner. About 8:30 Mr. Zissu came to her mother's apartment and handed back affiant her key."

We didn't even know about the undercover man being up there at 7:30 at all. This was a whole month ago. She told the government that Mr. Zissu had come there about 7:30, which was about the same time as I found out yesterday as Mr. Odekirk, the informer, came.

Now, isn't it true that under the circumstances of this particular case, that it all figures out. Just listen: This was made a month ago to Mr. District Attorney so he would know exactly what we were going to testify [179] at this trial. This is no surprise.

Now, we find out yesterday through Lieutenant Belland, much against Mr. Pomeroy's objection, the

name of the stool pigeon and what he did. He came there and met Lieutenant Belland about 7:30. He was up there trying to follow Mr. Zissu, and he saw Mr. Zissu go in Room 1, and that is why they knew the stuff was in that room and that is why they were so confident and walked right up there. There just isn't any question about that.

Where is the great quantity of opium that the officers were going to find up there?

When you take this folder, which is the case of Solomon B. Zissu, you will find in this case that he was in possession of five ounces of smoking opium, which would be pretty close to twenty-four hundred grains. He must have been some wholesaler. And yet he gets a suspended sentence! And three hundred and some grains of smoking opium in addition to the twenty-four hundred grains, and three hundred and nine grains of Yen Shee, and one hundred and forty-four grains of Yen Shee partially-smoked opium!

This Europe Hotel,—nothing ever happened up there until Zissu came, and he came there just about six weeks before he died. Now, what was the sinister purpose for him, [180] living at the Caledonia Hotel and coming to the Europe Hotel and using this woman in order to stay there for a month?

What did he have in mind? He had something. He was a former addict and a former wholesaler. What did he have in mind by getting the room at the Europe Hotel? He had something in mind. Can't you put two and two together and find out

where that large scale of opium went—that was delivered to the Europe Hotel?

Mr. Zissu, he had this thing up there perhaps as a blind and was probably using it in order to make contacts to get this large amount of opium.

We didn't go ahead and find out all of this about Mr. Zisu. All she knew was that a man by the name of,—he was going by the name of Hemlock. It wasn't until we got his ration book that I got his name and from then on I found his name up here in Federal Court and other public records which indicate the same thing.

There just isn't any doubt in this case but what Mr. Zissu came to the hotel a month before this thing happened. And that he got a large quantity of opium delivered there at the hotel.

The officers knew about it and they came up there and investigated. [181]

He might have come up there at 7:30 that night, just as our affidavit said, before we even heard the Government's case, and he might have gone into the room as she was having dinner. As you recall, she got home about 6:30, and she had been painting and had been out shopping that afternoon.

We have never tried to cover up anything before the jury but have submitted the whole case, because I know that if all of the evidence gets in before this jury that your verdict will be Not Guilty. This affidavit is in the file and will probably be taken into the jury room and you will see that it is exactly the same thing that was given the govern-

ment a month ago,—nothing had been changed at any time.

He says, too, why didn't she tell who this belonged to? Don't you recall before when she was taken from her hotel room to the Police Station and to Mr. Belland's office and she was there with Mr. Belland and some other Federal narcotic agent who never got on the stand and deny it,—and he didn't deny it. "We know this doesn't belong to you; who does it belong to?" And then she told him the man it belonged to is much worse off than I am, and it wouldn't do me any good in the second place to tell you his name. Now, what man was worse off than she was? Two and a half weeks later he dies, here [182] in Seattle. It all checks back. Who else could she have been talking about? The man who had befriended her and the man who came to her hotel for a room, she didn't know he had another room at the Caledonia Hotel. The probation officer testified he never did give this other place up. Why did he have this room at the Europe Hotel? It wasn't for any good purpose; it was for some immoral purpose. There isn't any question about that. The man was on probation and if he was caught doing anything wrong he would have to go to jail for five years. He was plenty smart—and died worth plenty of money.

Mr. Pomeroy: There isn't any such evidence in this case.

Mr. Onstad: It is a public record.

Mr. Pomeroy: It is not beyond comment.

The Court: The objection is sustained.



Mr. Onstad: I want to sum up briefly some of the highlights of this case—that defendant's story has been absolutely the same all of the way through. She told Lieutenant Belland about it and he never denied that she didn't say that, and also he testified yesterday that Odekirk said he knew the manager of the Europe Hotel, and that she might know something about the delivery up there, but that she was not in that business. He told [183] you that yesterday.

He also told you that it was a man's suit case. And the other two officers who came in later on said it was a woman's suit case. I say if it was a woman's suit case they would have brought it here. Secondly, why would a woman be living out of a suit case after living in a place for over two years? They don't do that, leaving their nice silk and things like that on the floor and have on top of it this opium thing.

There are a lot of things that you are going to think about that I haven't time here to reiterate. I am only reiterating some of the important things. You men can go in and argue these things out. It is up to you to carry on and find out where the truth lies in this case. And bring in a verdict from that.

When the officers knocked on the door, why did the officers go and look in the window? Because they know if a person is an addict and they know they are going to be arrested that they would start firing the things out of the window right away. But did she fire anything out of the window? No. She

just grabbed it out of the suit case and hid it in her bed—just a woman's intuition.

Don't you think if she had had a lavatory there, and was a dope addict,—if someone was smoking [184] opium, and the fumes go out the way these officers say, and there is a possibility that she might be caught with some of this in her possession—even dope fiends don't like to be caught with it in their possession. Don't you suppose she would have set the place up with men's clothing and had a door off of it so that if they had broken in there—why, that belongs to John Jones or somebody else? No. Here she has it right in her own office, where people come to pay the rent. Here she was, according to the Federal Narcotic Bureau officers, smoking for how long? I asked Mr. Belland how long people smoke. He said some of them smoke for ten or fifteen minutes, and that some of the hardened addicts smoke for an hour.

Under the testimony of Odekirk he had been there previous to 7:30. He met Belland at 7:30 and then they go to the hotel and come back to Sixth and Jackson and arrest somebody down there and book him at the Police Station and then all get in the car and go back to the Europe Hotel which is about 9:00 o'clock, and the smoke is still coming out of that room. Yet, there wasn't one bit of testimony in this case that this girl was under the influence of opium at all—not a one of them said that she was an addict. They talked to her, she acted normal, and so forth. What do you think a person,—how would they be affected if they had been smoking

opium for over an hour and a half that the Government has testified that the fumes were coming out of this place? Do you think they would be able to drive a car? Do you think their eyes would have been normal,—the pupils of their eyes normal? Do you think their walk would have been steady? Do you think their voice would have been normal?

There wasn't one bit of testimony by the Government in this case that this woman wasn't anything but normal.

Yet, on the other hand, Mr. Pomeroy, and these men there, want you to believe that she smoked opium in that room for an hour and a half to two hours and there was nothing wrong with her. It is the silliest thing I have ever heard.

In this case the Government agents have gyrated like a weathercock in a whirlwind and every time I tried to nail down a board it slipped away,—something had changed! First, someone is smoking opium and then Lieutenant Belland goes down to the Narcotics Bureau when we have got three hundred police in the town which he should have gotten to make the arrest for some poor weak-minded rotten immoral *purpose* who is smoking opium.

How to do things like that stand up in the minds [186] of the jury?

How can ordinary people,—and this jury is the most sensible jury I have seen in a long time—believe anything like that? Why,—it has been shocking the way the Government has handled this case,—not Mr. Pomeroy. Mr. Pomeroy is a very fine District Attorney, but he has had a bad case

to work with. They went off half cocked and this is what you have. This case just doesn't stand up on its two feet—at no time from the starting to the ending of it—even with the changing of their story about the suit case which they would have brought in here if it had contained women's clothing.

I say to you, ladies and gentlemen of this jury, that there is not one bit of testimony in this case that this girl ever at any time from the time the officers came in, ever showed any evidence of using opium, and, do you think that a person could use opium for two hours and not show it? Do you think you could drive your car and have conversations with police officers and tell them the story she told them and come in here a month or a few days later and make an affidavit as to what she told the officers, and the officers admit it is true; yet, she had been smoking opium for two hours, and her story stands up and it is not denied by Lieutenant Belland, that she said it belonged to a man who was in [187] worse condition than she was. That was before she had had a chance to talk to myself or any lawyer and she said, no, it belonged to somebody who is worse off than I.

I have used up a lot of time, but this girl never had any trouble in this hotel until Zissu came in there. The stuff I have dug up about Zissu is from the Government's own records. The evil that men do live after them, and there is plenty of evil in this case.

Thank you, ladies and gentlemen of the jury.



## PLAINTIFF'S CLOSING ARGUMENT

Mr. Pomeroy: If the Court please, Counsel, and ladies and gentlemen of the jury, the talk by Mr. Onstad impressed me with the fact that is the one who has been doing all of the testifying in the case. He made up the story and did most of the testifying rather than his client in telling what actually happened up there. He says that he knows all about narcotics and how a narcotic will act in one breath and in the next he says he never had one before and doesn't know anything about it. He says he was an Acting Police Judge for two years and knew everything about the Police Department and what happened down there. I also happened to be an Acting Police Judge and he never saw a narcotic in the Police [188] Court and I never saw one. There is only one Seattle policeman assigned to the Narcotic Squad and that is Lieutenant Beland. He reports to the Federal Narcotics Office more than he does to the Police Station and he works hand in hand with the Federal Narcotics officers because of the fact that it is the Federal business to see that the narcotics traffic is stamped out.

Yes, there are two State narcotic officers, and what they do is keep a record for the State of the amount of narcotics that are handled through the drug stores. It is under the State Pharmaceutical Board that they do have State narcotic officers.

Mr. Onstad: I would like to object to this because any police officer has a right to make an arrest for any violation of law that there is. He



implies in his argument that Lieutenant Belland is the only man who has a right to arrest somebody for narcotics. I even have a right to arrest anybody for violation of the narcotics laws. It is not true.

The Court: The jury will disregard any and all comment not supported by the evidence.

Mr. Pomeroy: Lieutenant Belland works with the narcotics officers all of the time. He is the only policeman who has anything to do with narcotics and his office is in this building rather than in the Police [189] Station.

He keeps talking about smoke coming out of the room. There wasn't a bit of evidence by anyone that there was smoke coming out of the room—the smell of smoking opium was coming out of the room. To hear him tell the story you would gather the fact that the room was on fire and the smoke was pouring out of this room. That was not what we said at all and it was not the testimony of anyone.

The testimony was that you could smell the odor of smoking opium. He lays this at the hands of a man by the name of Zissu—a very convenient death for Mr. Onstad to tell his story.

I submit that this affidavit which he read to you—he made it up—he made up the story. I will show you why he made up the story. Part of the affidavit—I don't know that he read it—this part of it. He said that after the officers had searched the room “they found a paper sack in the affiant's bed which contained an opium bottle, the pipe and

opium, the quantity of which is unknown to affiant." And he gets her to sign it and notarize it. She on the stand said she took the paper sack off and they didn't find any paper sack in the bed. That is his story. He is the one who is doing the testifying. It wasn't his [190] defendant's or his client's. He dictated this, I believe, and had her sign. So all of this story he is talking about is nonsense.

Another thing, if he wanted to prove that Solomon Zuma was living there, why didn't he bring in the hotel register and prove it? That is his story after the man died. And this affidavit was made after the man died. Why didn't he bring in the hotel register? He is talking about this suit case. We never took the suit case. We left it there. This stuff didn't come out of the suit case, it came out of the bed. He is the one who brings in the matter about the suit case. He tries to say we stated she was living out of the suit case. We never said that. That is his statement.

She gets on the stand finally and she says, "I don't know what was in there. All I know is that there was this stuff in there." He has still got the suit case up there. Why didn't he bring it in and show it to us? I don't know what difference it makes. Nobody is saying that the suit case belonged to her. I don't know who it belonged to, but it is not hers. She denied it on the stand. His story was that it was full of men's clothing, because he is trying to place it in the hands of somebody who is dead and can't speak for himself.

In Count I and III, you will find a word in [191] there which says, "purchase"—that she purchased certain things. If you listen carefully to the Court's instructions, that means possession. That is what we call a possession count—that she was in possession, without the stamps on the packages. Now, he says that we should have checked this over to see about the fingerprints. Well, she admitted she was right there when it was found on her bed. In her own affidavit which later was filed, she never denied she picked it up. We know her fingerprints would be on there. We were not after anybody else. We were after her.

Mr. Onstad says she should have been stunned or should have been under the effects of this opium. I wish he would have brought a doctor in here, if that is the kind of story which he wanted to tell this jury and tell just exactly how people act when they are under the influence of different types of narcotics. If he is not familiar with narcotics cases, he wouldn't have gotten up here and made the story he did without bringing a doctor in here. I will venture to say there isn't a jurymen in this jury box who has not passed people on the streets who are under the influence of narcotics. Do you know them? Can you tell them? He stands up and says she was not under the influence of narcotics. Some people really take narcotics exceptionally well and are more steady when they have taken narcotics than when they don't have them; that is, for a time, and when the reaction comes in, from the withdrawal effects

of not having the opium, that is when they are shot to pieces. Maybe he did talk to a doctor and knew that was what the doctor would have said, so he didn't bring him in.

Nobody said that this was cold either. There is no testimony to that. Lieutenant Belland said he went over and dumped that out, full of oil. The point is that somebody had been smoking. That is the important part of this case. That is what I asked him. Maybe I should have asked about this other thing. He asked Graben about it and Graben didn't say it was cold either.

Belland is the man who said he took this over and dumped the oil out. Maybe if he had asked him about that Belland would have told him it was warm, but this is the main important part and that is the part that shows someone was smoking.

So we have no hotel register here. We don't have the suit case, which we never took and had nothing to do with. We left it there because we didn't think it was important in this case until this man died and she claims that he did.

I submit, ladies and gentlemen, that the Narcotics Bureau has been given the duty of enforcing the [193] Narcotic Laws and eradicating narcotics from our daily life in this community so that it won't ensnare other persons and get innocent people ensnared in the use of this degrading stuff. If you believe that this defendant took the stand and told you the truth, and that all of these officers are telling a lie, purging themselves to you, go ahead and acquit her. She in her own story says she is



guilty of concealing it after importation. And if she did know it was there and it belonged to somebody else, she deliberately concealed it when the officers did come in; so she herself says she is guilty on two counts.

But there is only one story here and that is the story of Mr. Onstad, because he is doing the testifying. He is the one who made up that story—it wasn't the defendant at all, and this man's death was just a convenience to make it seem better. But he could have proved a lot more things if he had brought in the suit case and brought in the hotel register to prove that this man was an evil character and had two rooms. We don't know. She says he did and he put the words in her mouth.

I submit she should be found guilty on all four counts and not call these officers of the law for many years—one man testified over twenty years, as an [194] officer in the Narcotics Service—and call them purgerers.

Thank you, ladies and gentlemen of the jury.

### COURT'S ORAL INSTRUCTIONS

The Court: Members of the Jury, you have heard the testimony and the argument of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

In this case there is one defendant, Anne Johnson, on trial on four counts of the indictment. Counts I and III are what those referring to such counts as ordinarily call Possession Counts, but there is no such language in them. They charge



purchase,—Counts I and II do,—whereas Counts II and IV charge concealment,—in effect, that is what they charge—concealment of certain narcotics after unlawful importation of such narcotics by the defendant knowing of such unlawful importation.

Those are the essential difference between the two kinds or groups of counts in this indictment. [195]

Speaking of each one separately, you are instructed that in Count I of the indictment, the defendant in effect is accused of purchasing on or about April 6, 1946, approximately eighty-five grains of opium prepared for smoking, which was not then in nor from the original stamped package.

In Count II of the indictment, the defendant in effect is accused of knowingly—on the same date—receiving and concealing eighty-five grains of opium prepared for smoking, which opium had theretofore been imported and brought into the United States of America contrary to law, and that the defendant knew of such unlawful importation.

In Count III of the indictment, the defendant in effect is accused of purchasing on the same date approximately forty-one grains of Yen Shee, partially smoked opium prepared for smoking, which was not then in nor from the original package.

In Count IV of the indictment, the defendant in effect is accused of knowingly on the same date receiving and concealing forty-one grains of Yen Shee, partially smoked opium prepared for smoking which had theretofore been imported and brought into the United States of America contrary to law.

To the indictment and to each and all of the [196] counts thereof the defendant has entered a plea of not guilty. This plea of not guilty puts in issue every material allegation of the indictment and each count thereof on which defendant is being tried, and casts on the Government the burden of proving the guilt of the defendant by the evidence beyond a reasonable doubt. The defendant is not called upon to disprove the charges of the indictment nor to prove her innocence.

The indictment is merely the paper charge and the formal accusation against the defendant, which she has had no opportunity to answer until this trial, and the indictment is not to be considered by you as evidence in any sense against the defendant, and the fact that the indictment has been returned by the Grand Jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states. The burden is always on the Government to prove the defendant guilty by competent evidence beyond a reasonable doubt, and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each and every count of the indictment on which the defendant is being tried. As to those counts, you must decide [197] the guilt or innocence of the defendant as to each and every count separately, and if you have a reasonable doubt as to any material allegation of the particular count of the indictment you are considering, it is your duty to acquit

the defendant as to such count; but, if you have no such reasonable doubt concerning any such allegation, it is your duty to convict on each count as to which, under the evidence, you have no such reasonable doubt.

The defendant on trial, as well as every defendant in a criminal case, is presumed innocent of the charges contained in the indictment until she is proved guilty by the evidence beyond a reasonable doubt, and this presumption is one of her important rights, not to be ignored or lightly considered either by the Court or by the jury. It is one of the important rights which the law accords all persons accused of crime. It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been overcome by the competent evidence in the case, and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence which under the law clothes all accused persons. This applies to the [198] defendant on trial here.

By the expression "reasonable doubt" is meant in law just what those words in their ordinary and everyday use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable, and not merely imaginary or capricious. It is such a doubt as, if entertained by a person of ordinary prudence, sensibility and decision, he would allow

to have influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt, and it must rise out of the honest minded, common sense consideration and application of the evidence in the case or from lack of evidence in the case.

If from a fair and candid consideration of all the evidence you can say upon your oaths as jurors that you have an abiding conviction of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such moral conviction, or if you entertain doubts for which sane and satisfactory reasons can be assigned in your minds, you must give the defendant the benefit of that doubt and find her not guilty.

Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of her guilt.

In considering the evidence in this case I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that it is inconsistent with her innocence and inconsistent with every other reasonable hypothesis except that of guilt.

If the testimony in this case, in its weight and effect, be such that two conclusions can be reasonably drawn from it, one favoring the defendant's



innocence and the other tending to establish her guilt, then you should indulge the presumption of defendant's innocence and find the defendant not guilty.

The law does not require the Government to prove a defendant guilty beyond all possible doubt, as such proof in many cases would be impossible; but the Government must prove the defendant guilty beyond a reasonable doubt as defined in these instructions. A reasonable doubt may be created by lack of evidence or [200] it may be created by the evidence itself.

The law under which this indictment is drawn, so far as Counts I and III are concerned, is the Revenue Law. Narcotic drugs are by the Revenue Law made the subject of taxation by the United States Government. A tax is collected by means of stamps sold and attached to the package in which the narcotic drug is contained, and cancelled.

You are instructed that the absence of appropriate tax-paid stamps from any of the drugs described in Counts I and III shall be prima facie evidence of the violation of this section of the law by the person in whose possession the same may be found.

Count IV of the indictment in form and manner therein set forth, charges that the defendant did knowingly receive and conceal forty-one grains of Yen Shee, partially smoked opium prepared for smoking, which had theretofore been imported and brought into the United States of America con-



trary to law, and that the defendant then knew said opium had been so imported.

The burden is on the government to prove by the evidence beyond a reasonable doubt the material allegations of each of these counts, including, among others, that the defendant knew that the opium was unlawfully [201] imported.

You are instructed that if any person fraudulently or knowingly imports or brings any narcotic drugs into the United States, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person is guilty of violation of the laws of the United States.

One section of the law provides that, "All smoking opium or opium prepared for smoking within the United States shall be presumed to have been imported contrary to law, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

If the defendant on trial here is shown by the evidence beyond a reasonable doubt to have or to have or to have had, possession of the narcotics as alleged in Counts II and IV of the indictment, such possession shall be deemed sufficient evidence to authorize conviction of defendant of the charge or charges as so alleged unless the defendant explains to the satisfaction of the jury that the defendant was rightfully in possession of such narcotics. [202]

If the defendant does so explain, then she is not guilty and should be acquitted of the charges in Counts II and IV.

As to each and all of the counts in the indictment, if from the evidence you believe that the defendant did not purchase or conceal such narcotics, and that such narcotics did not belong to defendant, and that she did not conceal them, or that those facts have not been established by the evidence beyond a reasonable doubt, then you must find the defendant not guilty.

It is not necessary for the government to prove that there was the exact quantity of narcotics involved as in each count of the indictment alleged, but it is sufficient if the proof shows that the defendant is guilty of the violation charged with reference to any quantity of narcotics of the kind alleged, whether such quantity be more or less than the amount alleged.

Intent is an ingredient of crime. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which she operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of [203] the circumstances disclosed by the testimony of the witnesses, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent.

There are two kinds of evidence. Direct or posi-

tive, and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which concludes or leads to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict. You will review all the circumstances in the light of this instruction.

You are the sole and exclusive judges of the evidence, and of the credibility of the several witnesses [204] and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other facts or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.



You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

The defendant having testified as a witness, the foregoing relating to credibility of witnesses and weight of testimony applies to the defendant and her testimony, as well as to all the other witnesses in the [205] case.

You are instructed that the Government does not desire to have you bring in a verdict finding the defendant guilty unless the verdict is supported by the evidence beyond a reasonable doubt, but that neither does the Government want a guilty defendant to escape.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

You will consider all evidence admitted by the Court before you, and you will disregard all evidence and exhibits offered but not admitted by the Court, and all evidence stricken by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel, and you should not allow the making of objections and the taking

of exceptions by counsel to influence or confuse you.

In your deliberations and in reaching a verdict you should act only upon the evidence which has been admitted and the law as it has been given to you by the Court. Statements, if any, by counsel or the Court, [206] unsupported by your own recollection of the evidence, you will disregard.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose in this case is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

It is your duty as jurors, to confer with each other freely and frankly about, and to discuss together honestly, the questions involved in this case for the purpose of agreeing, if you can honestly do so, upon a common verdict. In the end, however, the jury's verdict ~~must~~ be the verdict of each and all twelve of you. A verdict representing the opinions of any lesser number is not a lawful verdict.

The law does not contemplate that any one of you will surrender his or her own individual opinion about the guilt or innocence of the defendant so long as such one of you personally believes he



or she is right. Regardless of what the opinions of your [207] fellow jurors may be, as long as you have a reasonable doubt about the guilt of the defendant, if you have such reasonable doubt, it is your duty to vote for an acquittal. Also, it is the duty of each one of you to vote for conviction so long and only so long, as you are convinced beyond a reasonable doubt, if you are so convinced, of defendant's guilt.

I might add this further thought to the jurors, by way of an explanation, not as an instruction on the law.

Counsel in the case on both sides have brought before the Court and jury all of the admissible evidence that they know of to enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge, what more could be done to properly enable the jury to perform its duty. You now have all of the means necessary to a decision. In this court, the instructions in written form are not sent to the jury room.

The indictment in this case will be sent to the jury room with you merely to show you the paper charge against the defendant, but is not to be considered as evidence. You will take with you to the jury room the [208] exhibits in the case and this form of verdict. The verdict is in the usual form. As to each count on which defendant is being tried, before the word "guilty" is a blank space, and you will write in that blank space, in

each instance, the word "is" or "not" as you find. It will require your entire number to agree on a verdict, and when you have so agreed you will cause your verdict to be signed by your foreman, whom you will elect from among your number immediately upon retiring to the jury room, and return with your verdict into open court.

Counsel, have I overlooked anything?

Mr. Pomeroy: I know of nothing.

Mr. Onstad: I know of nothing, your Honor.

The Court: If there are any exceptions to be noted, I shall upon being so notified temporarily excuse the jury for that purpose.

Are there any exceptions?

Mr. Pomeroy: No exceptions, your Honor.

Mr. Onstad: Your Honor, I have no exceptions at all.

The Court: Swear the bailiffs.

(Whereupon, at this point two bailiffs were sworn.) [209]

The Court: The jury will now retire to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this case.

The case is now finally submitted to the jury for the consideration of the jury's verdict. It is now entirely in your hands. You will retire to consider your verdict.

(Jury retires from the court room to consider the verdict.)

(At 11:25 a.m., Court recessed until the Jury returns with their verdict.)

**CERTIFICATE**

I, Merritt G. Dyer, official reporter in the above-entitled court do hereby certify that the foregoing is a true, full and correct transcript of the proceedings had in this case.

/s/ MERRITT G. DYER,

Official Reporter. [210]

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[Endorsed]: No. 11407. United States Circuit Court of Appeals for the Ninth Circuit. Anne Johnson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 10, 1946.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11407

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT RELIES, AND PORTIONS  
OF THE RECORD RELATING THERETO.

The Appellant, Ann Johnson, relies upon the following points in this Appeal:

1. The Trial Court erred in denying the Appellant's (Defendant's) petition to suppress evidence taken from her home in the night time and without the authority of a search warrant, the search, seizure and subsequent admission of the evidence seized, violating her rights under the Fourth and Fifth Amendments of the Constitution of the United States.

The portions of the record necessary for the consideration of this point are:

- a. Indictment.
- b. The Petition to Suppress and the Affidavit in Support Thereof.
- c. Affidavit of James A. Goode.

- d. Affidavit of Gilbert T. Belland.
- e. Affidavit of Walter A. Graben.
- f. Affidavit of Kay Doran.
- g. Order denying Petition to Suppress.

2. The Assistant United States Attorney committed prejudicial error in his argument to the jury in the following particulars:

i. In accusing the Defendant of perjury and in accusing her counsel of subornation of perjury, there being no evidence upon which such accusations could be based, and such argument being in no way justified as fair comment.

ii. By appealing to the passion and prejudice of the jury.

iii. By stating as facts matters which were not proved and which had no foundation in the evidence admitted.

The Portions of the Record necessary for the consideration of this point are:

a. Pages 162, 163, 165, 166 and Pages 188 to 194 Inclusive of the Reporter's Transcript of Testimony.

b. The Court's instructions to the Jury, Pages 195 to 209 of the Reporter's Transcript of Testimony.

3. The Court erred in denying the Defendant's Motions for Directed Verdict with respect to each and every count in the Indictment.



The portions of the record necessary for the consideration of this point are:

a. Pages 86, 91 and 156 of the Reporter's Transcript of Testimony.

H. SYLVESTER GARVIN  
ANTHONY SAVAGE

Attorneys for Defendant-  
Appellant.

Received a copy of the within Statement this 27 day of Sept. 1946.

/s/ J. CHARLES DENNIS

Attorney for U. S.

[Endorsed]: Filed Sept. 30, 1946.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE TRANSCRIPT  
OF RECORD

It is hereby stipulated by and between the Appellant, Anne Johnson, through her attorneys, H. Sylvester Garvin and Anthony Savage, and the Appellee, United States of America, by United States Attorney for the Western District of Washington, that all of the items set out in the Appellant's Designation of Portions of Record to be

contained on Appeal should be printed as the transcript of record in the cause.

/s/ H. SYLVESTER GARVIN

/s/ ANTHONY SAVAGE

Attorneys for Appellant.

/s/ J. CHARLES DENNIS

/s/ ALLAN POMEROY

Attorneys for Appellee.

[Endorsed]: Filed Sept. 23, 1946.

**No. 11407**

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IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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**ANNE JOHNSON,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division**

---

**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday,  
May 14, 1947.

Before: Stephens, Healy and Orr,  
Circuit Judges.

**ORDER OF SUBMISSION**

Ordered appeal herein argued by Mr. Anthony Savage, counsel for appellant, and by Mr. John Belcher, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

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United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday,  
June 20, 1947

Before: Stephens, Healy and Orr,  
Circuit Judges.

**ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF  
JUDGMENT**

Ordered that the typewritten opinion this day rendered by this Court in the above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11,407

June 20, 1947

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Northern Division

Before: Stephens, Healy and Orr,

Circuit Judges.

Stephens, Circuit Judge.

### OPINION

Anne Johnson is appealing from the judgment after she was tried, convicted and sentenced (Count 1) for purchasing "approximately 85 grains of opium prepared for smoking, which was not then in nor from the original stamped package," 26 U. S. C. § 2553a, (Count 11) of having "knowingly received and concealed 85 grains of opium prepared for smoking, which had theretofore been imported and brought into the United States of America contrary to law \* \* \*," 21 U. S. C. A. § 174, (Count 3) of purchasing "approximately 41 grains



of yen shee, partially smoked opium prepared for smoking, which was not then in nor from the original stamped package," 26 U. S. C. § 2553a, (Count 4) of having "knowingly received and concealed 41 grains of yen shee, partially smoked opium prepared for smoking, which had theretofore been imported into the United States of America contrary to law \* \* \*," 21 U. S. C. A. § 174.

Appellant claims reversible error because the conviction would have no substantial support without evidence secured through an illegal search and seizure (Fourth Amendment of United States Constitution) and because of misconduct of counsel for the government.

There is substantial evidence to support the following factual situation:

Officer Belland, with long experience on a narcotic detail, was informed that smoking of opium was in progress in a certain hotel. At the time of receiving such information, the officer was engaged in the arrest of a person, and upon completion of that duty, he proceeded to investigate the information given him. He arrived at the hotel shortly before 9:00 p.m., taking three other officers with him, and with two of the officers, went to the second floor, where he detected a strong odor of burning opium. The officers traced the odor to room number one, and there smelled strong current of opium fumes coming from the cracks in the panels and from the cracks around the loosely fitting door.

Officer Belland rapped, stated his name and requested admittance. There were sounds of someone scurrying around within the room for several minutes, after which the officer was admitted by appellant. Upon inquiry as to the opium fumes, she denied their presence, whereupon she was placed under arrest and a search for evidence of smoking opium was set in progress. A rather complete opium smoking outfit with opium was found under bed covers; the pipe still being quite warm. Yen shee was discovered in a suit case.

The search was not unreasonable or illegal provided the circumstances just briefly related were sufficient to constitute probable cause for the arrest. *Kwong How v. United States*, 71 Fed. 2d 71; *Garske v. United States*, 1 Fed. 2d 620; *Carroll v. United States*, 267 U. S. 132; *Stacey v. Emery*, 97 U. S. 642; *McCarthy v. DeArmit*, 99 Pa. 63; *Green v. United States*, 289 Fed. 236; *Pong Ying v. United States*, 66 Fed. 2d 67.

The following cases are cited as authority for the conclusion that mere smell of burning opium is not sufficient to constitute probable cause. *Taylor v. United States*, 286 U. S. 1; *United States v. Lee*, 83 Fed. 2d 195; *United States v. Kind*, 87 Fed. 2d 315; *United States v. Kaplan*, 89 Fed. 2d 869.

Of course, there is nothing in the statutory law to the effect that the sense of smell alone is not sufficient to constitute probable cause, and, therefore, any such holding in a given case is premised

upon the facts of the given case. We venture to say that the smell of opium fumes may in some circumstances be second only to the well-known maxim that "Seeing is believing." In this case we find three experienced officers being directed to the door of appellant's room by the sense of smell and there experiencing the current of the fumes coming from the cracks of an ill-fitting and loose-paneled door. Before admission, there ensues some minutes of scurrying within; when admitted, appellant is found to be alone. No one has left the room because all exits have been under observation. All of this follows the informer's "tip." The whole action on behalf of the officers has been prompt and delay for the purpose of securing warrant for arrest and search in the circumstances probably would have been fatal to the detection of the suspected crimes.

We hold the arrest to have been made under probable cause, and the search and seizure to have been reasonable and legal.

We come now to the conduct of the prosecuting officer.

It goes merely with the saying that public prosecutors in the performance of their duties must present their cases and their argument with care and vigor. Too much nicety would destroy the true effect of a point under presentation. It is not unusual, however, for a defense counsel to "bait" the prosecuting attorney and reasonable counter strokes may be justified even though the prosecutor is the people's attorney and should strive only for justice.

The bar, however, should never be degraded to that of a pasquino by one of its officers, least of all by a government counsel in a criminal case.

The deputy district attorney closed his argument to the jury with a disconnected, flamboyant talk, mainly accusatory of defendant's counsel, asserting that in his belief counsel had "concocted" and "made up" the "story" of the defense. The appellant, however, took no exception to the remarks, and the court properly instructed the jury that the verdict should be drawn from evidence introduced and that "Statements, if any, by counsel or the court, unsupported by your own recollection of the evidence, you will disregard." Almost at the conclusion of the instructions the court stated that neither court nor counsel knew of more that "could be done to properly enable the jury to perform its duty." At the very conclusion the court asked counsel if anything had been overlooked and if any exceptions were to be noted. Both counsel answered in the negative, defense counsel saying, "Your honor, I have no exceptions at all."

The remarks which were complained of only after the verdict of guilty had come in constitute a good example of the way the government should not present a case to the jury. However, the evidence in the case just about demonstrates appellant's guilt, and it is hardly conceivable that the accusations by government counsel could have influenced the verdict in the slightest. Since we hold this view and since counsel for appellant was satisfied with the situation at the time the case was given to the jury,

we hold that the misconduct did not constitute reversible error.

Affirmed.

[Endorsed]: Opinion. Filed June 20, 1947.  
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11407

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered June 20, 1947.



United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday,  
August 15, 1947

Before: Stephens, Healy and Orr,  
Circuit Judges.

ORDER DENYING PETITION

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed July 18, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred twenty-four (224) pages, numbered from and including 1 to and including 224, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of August, 1947.

[Seal]

PAUL P. O'BRIEN,  
Clerk.

## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 27, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to questions 1 and 2 presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3400)

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 5 1947
CHARLES ELMORE DROPLEY

No. **329**

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1947

ANNE JOHNSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit  
and  
BRIEF IN SUPPORT THEREOF**

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*Counsel for Petitioner.*

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*Of Counsel for Petitioner.*

No. ....

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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1947**

---

**ANNE JOHNSON,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit  
and  
BRIEF IN SUPPORT THEREOF**

---

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*Counsel for Petitioner.*

---

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*Of Counsel for Petitioner.*

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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1947**

**ANNE JOHNSON,**

*Petitioner,*

**vs.**

No. ....

**UNITED STATES OF AMERICA,**

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit**

*To The Honorable Fred M. Vinson, Chief Justice of the  
United States, and to The Honorable Associate Jus-  
tices of the Supreme Court of the United States:*

The petition of Anne Johnson for a Writ of certi-  
orari to the United States Circuit Court of Appeals  
for the Ninth Circuit respectfully shows:

**STATEMENT OF THE CASE AND THE MATTERS  
INVOLVED**

The petitioner was convicted in the District Court  
of the Western District of Washington, Northern Di-  
vision, on four counts of an indictment, two of which  
charged her with purchasing certain amounts of smok-  
ing opium and Yen Shee and two of which accused her  
with receiving and concealing the same amounts of  
opium and Yen Shee which had theretofore been un-  
lawfully imported into the United States. Title 26,

U.S.C.A, 2553a and Title 21 U.S.C.A. Sec. 174 (R. 2, 20).

The petitioner, Anne Johnson, owned and operated the Europe Hotel in the city of Seattle, Washington. On the night of April 8th, 1946, at approximately 8:00 o'clock in the evening, one Gilbert T. Belland, a city of Seattle police officer assigned to the Federal Narcotics squad, was advised by a confidential informer that there were unknown persons smoking opium in the Europe Hotel at the time (R. 38). Belland then got in touch with four Federal Narcotic agents and communicated to them the information he had received. The officers first completed another assignment and then proceeded to the Europe Hotel, arriving at approximately 9:00 o'clock. They made no attempt to obtain either a warrant for the petitioner's arrest nor a search warrant authorizing the invasion of her room.

Upon arrival, two of the officers entered the hotel and proceeded to go upstairs. They noticed a strong odor of opium which lead them to the room of the petitioner (R. 38). One of the officers was stationed on a fire escape which overlooked the only window of the room. Another officer was left at the entrance below. Belland then knocked on the petitioner's door and, in response to her inquiry, stated that he was Detective Lieutenant Belland. He was asked to wait a minute and during the interval he heard some shuffling or noise inside. Thereafter the petitioner opened the door and the officers informed her that they wished to talk about the opium smell in the room.



In addition they stated that they wanted her to consider herself under arrest because they were going to search the room (R. 39).

Up to the time the officers entered the hotel, knocked on the petitioner's door and identified themselves as officers of the law, they had not seen the petitioner nor did they know whether anyone was in the room, nor, were they able to tell whether opium was being smoked at the time of their arrival or whether someone had smoked it an hour or two before and departed the scene (R. 74). Nor, was there any contraband in sight at the time the door was opened. All the evidence, which consisted of a small quantity of opium, a small quantity of Yen Shee, and smoking paraphernalia, was concealed under the covers of the petitioner's bed and was not found for several minutes after the officers began the search (R. 98, 101).

The petitioner testified that the articles found belonged to a former friend of hers who had been suffering from pulmonary tuberculosis and heart trouble (he had died before the case came on for trial); that she believed he was using narcotics under instructions from his doctor and that she believed the opium outfit was legal with her friend because he was under a doctor's care (R. 118, 119, 128, 132).

Prior to the trial the petitioner moved to suppress the evidence seized in her bedroom because the search and seizure was without warrant and in violation of her constitutional rights (R. 4). Three of the Government agents filed counter-affidavits in resistance to the motion. In all three of the affidavits the officers



swore to receiving information that certain unknown persons were smoking opium in the Europe Hotel and that they had been led to the petitioner's door by their sense of smell (R. 10 11, 12, 13, 14 and 15). Not one of those officers mentioned hearing any noise of any kind prior to the time petitioner opened her door in response to Officer Belland's knock. The Trial Court, after considering the motion, all of the affidavits and the oral argument of counsel denied the petition (R. 19).

Thereafter the petitioner objected to the introduction of the articles seized (R. 41, 107) and at the conclusion of the Government's case and at the close of all the testimony challenged the sufficiency of the evidence and moved the court for a directed verdict because the evidence introduced against her was seized in violation of her constitutional rights (R. 107, 165).

The United States Attorney, in his closing arguments to the jury, repeatedly and without any justification therefor, accused defense counsel of having made up the story of the defense and of having persuaded the petitioner to sign and swear to a false affidavit. The accusations ranged from fabricating the story and doing most of the testifying, to putting the words in the petitioner's mouth.

"He (Mr. Onstad) made up the story and did most of the testifying rather than his client in telling what actually happened up there." (R. 192)

Again at pages 193 and 194 of the Record, he made

these truly shocking charges of criminal misconduct on the defense attorney's part:

"I submit that this affidavit which he read to you—he made it up—he made up the story \* \* \*. And he gets her to sign and notarize it \* \* \*. That is his story. He is the one who is doing the testifying. It wasn't his defendant's or client's. He dictated this, I believe, and had her sign."

Once more at page 194 of the Record:

"His story was that it (suitcase) was full of men's clothing because he is trying to place it in the hands of somebody who is dead and can't speak for himself."

Yet, once more (R. 197):

"There is only one story here and that is the story of Mr. Onstad, because he is doing the testifying. He is the one who made up that story—it wasn't the defendant at all, and, this man's death was just a convenience to make it seem better \* \* \*. She says he did and he put the words in her mouth."

Again:

"If he is not familiar with narcotic cases, he wouldn't have got up and made the story he did without bringing a doctor in." (R. 195)

In addition the United States Attorney stated as facts mere matters of opinion which had no foundation in the evidence, and repeatedly in other ways, sought to prejudice the petitioner in the jury's eyes (R. 170, 172, 173). It is true that defense counsel offered no objection or saved any exception nor requested any cautionary instruction, yet it is likewise

true that the court, did not of its own motion interfere in the slightest degree but rather adopted and approved the United States Attorney's conduct and language in the following instruction:

Counsel in the case on both sides have brought before the court and jury all of the admissible evidence that they know of to enable the jury and the court to perform their respective functions. The court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge, what more could be done to properly enable the jury to perform its duty (R. 208).

### **JURISDICTIONAL STATEMENT**

#### **1. Jurisdiction of the Court.**

The jurisdiction of this Court is invoked under Section 240a of Judicial Code as amended (28 U.S.C.A., sec. 347). See also the Rules of Practice and Procedure, in Criminal Cases brought in the District Courts of the United States and the Supreme Court of the District of Columbia (18 U.S.C.A. following section 688).

#### **2. The Decision and Judgment of the Circuit Court of Appeals.**

The decision and judgment of the Circuit Court of Appeals was rendered on June 20, 1947 (R. 223). The Petition for Rehearing was denied on August 15, 1947 (R. 224). This petition, with supporting brief, and the certified record are filed within thirty days next after denial of Petition for Rehearing.

### 3. Basis Upon Which It Is Contended the Supreme Court Has Jurisdiction and Cases in Support Thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

a. The opinion of the Circuit Court of Appeals upholds a conviction of the petitioner upon a record which shows that a search and seizure of her private room was made in violation of her rights under the Fourth Amendment to the Constitution of the United States. *Agnello v. U. S.*, 269 U.S. 20; *Lefkowitz v. U. S.*, 285 U.S. 452.

b. The opinion of the Circuit Court of Appeals approved the conviction of the petitioner which was obtained chiefly by the prejudicial and inflammatory argument of the United States Attorney. *Berger v. U. S.*, 295 U.S. 78, and *Viereck v. U. S.*, 318 U.S. 237.

c. The opinion of the Circuit Court upholds the conviction of the petitioner upon a record which shows that evidence unlawfully seized in violation of the petitioner's constitutional rights was admitted over her objections. *Byars v. U. S.*, 273 U.S. 28.

### THE QUESTIONS PRESENTED

The questions presented and raised by this petition are as follows:

1. Whether Federal officers have the right to invade a person's living quarters in a hotel to make an arrest and thereafter a search and seizure without either a warrant of arrest or a search warrant, when the only basis for their action was an informer's tip

that unknown persons were smoking opium in the hotel and the officer's sense of smell.

2. Whether the trial court upon the petitioner's motion to suppress evidence seized from her sleeping room and in violation of her rights under the 4th and 5th Amendments to the Constitution, which motion was heard prior to trial upon affidavits and oral argument, should not have ordered the evidence articles seized suppressed for use as evidence, the counter-affidavits of the Government officers showing that they justified their arrest, search and seizure upon the tip of an informer and a sense of smell.

3. Whether the United States Attorney in his argument to the jury could fairly and without prejudice repeatedly accuse defense counsel with (1) fabricating the petitioner's story (2) persuading the petitioner to sign and swear to a false affidavit, (3) doing all the testifying, (4) putting the false words in the petitioner's mouth, (5) accusing the petitioner with the *fact* of falsifying in other instances in the case—all without any foundation—even though defense counsel failed to object or except to such argument.



## POINTS RELIED UPON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI

1. The opinion of the Appellate Court upholding the search and seizure is in direct conflict with applicable decisions of this court such as *Agnello v. U. S.*, 269 U. S. 20; *Byars v. U. S.*, 273 U.S. 28. And it is in conflict with comparable decisions of other Circuit Courts of Appeals such as *U. S. v. Lee* (C.C.A. 2) 83 F.(2d) 195. *Henderson v. U. S.* (C.C.A. 4) 12 F. (2d) 528.

2. The majority opinion approving the prejudicial argument of the United States Attorney is in direct conflict with applicable decisions of this court such as *Berger v. U. S.*, 295 U.S. 78; *Viereck v. U. S.*, 318 U.S. 237; and it is in direct conflict with comparable decisions of other Circuit Courts of Appeals such as *Weathers v. U. S.* (C.C.A. 5) 117 F.(2d) 585; *Pierce v. U. S.* (C.C.A. 6) 86 F.(2d) 949; *Sunderland v. U. S.* (C.C.A. 8) 19 F.(2d) 202.

3. Each of the matters passed on in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way not tenable and in conflict with the weight of authority.

4. The opinion of the Circuit Court so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power and supervision.

Wherefore, and for the reasons herein stated, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit

Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, Seattle, Washington,

August 28, 1947.

ANNE JOHNSON,

*Petitioner.*

JOHN F. GARVIN

*Counsel for Petitioner.*

H. SYLVESTER GARVIN

ANTHONY SAVAGE

*Of Counsel for Petitioner.*

No. ....

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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1947**

---

**ANNE JOHNSON,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

---

**BRIEF**

**In Support of Petition for Writ of Certiorari**

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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1947

ANNE JOHNSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

No. ....

**BRIEF**

In Support of Petition for Writ of Certiorari

**OPINIONS BELOW**

The judgment of the trial court was rendered on the 5th day of August, 1946 (R. 23).

The opinion and judgment of the Circuit Court of Appeals was rendered and filed on June 20, 1947 (R. 217, 218). The opinion of the Circuit Court will be found on page 218 of the Record.

The petition for Rehearing was denied by the Circuit Court of Appeals on August 15, 1947.

**JURISDICTION**

The date of the judgment to be reviewed is June 20, 1947 (R. 223) and the date of the Denial of the Petition for Rehearing is August 15, 1947 (R. 224).

The jurisdiction of this court is invoked under Section 240a of Judicial Code as amended (28 U.S.C.A., Sec. 347). See also the Rules of Practice and Pro-

cedure, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia (18 U.S.C.A. following Sec. 688).

### STATEMENT OF THE CASE

A full statement of the case has been heretofore given in the Petition for Certiorari, and for the sake of brevity the statement is not repeated here.

### SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the arrest of the petitioner was made under probable cause and that the search and seizure were reasonable and legal.

2. The Circuit Court of Appeals erred in holding that the closing argument of the U. S. Attorney "though disconnected, flamboyant and mainly accusatory of defendant's counsel asserting in his belief that counsel had concocted and made up the story of the defense," did not constitute reversible error because no objection was made thereto, no exception was noted and because the trial court stated that neither court nor counsel could do more to properly enable the jury to perform its duty; and further, because the "evidence in the case just about demonstrated appellant's guilt and it was hardly conceivable that the accusations by the Government counsel could have influenced the verdict in the slightest."



## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Constitutional and other provisions involved are set forth in appendix pages 22-24, *infra*.

## ARGUMENT

### Summary of Argument

1. The decision of the Circuit Court was contrary to and in conflict with prior decisions of this court and with decisions of other Circuit Courts of Appeal on the same matter and lowers the standard of proof required for arrest and subsequent search and seizure in a private home. *Agnello v. U. S.*, 269 U.S. 20; *Byars v. U. S.*, 273 U.S. 28; *U. S. v. Lejkowitz*, 285 U.S. 452; *Harris v. U. S.* decided May 5, 1947; *Taylor v. U. S.*, 286 U.S. 1; *U. S. v. Lee* (C.C.A. 2) 83 F.(2d) 195; *U. S. v. Kaplan* (C.C.A. 2) F.(2d) 869; *Brown v. U. S.* (C.C.A. 3) 83 F.(2d) 383.

2. The decision of the Circuit Court of Appeals is in conflict with prior decisions of this court and with decisions of other Circuit Courts of Appeal on the same matter and resulted in the petitioner having an unfair trial. *Berger v. U. S.*, 295 U.S. 78; *Viereck v. U. S.*, 318 U.S. 237; *Weathers v. U. S.* (C.C.A. 5) 117 F.(2d) 585; *Pierce v. U. S.* (C.C.A. 6) 86 F.(2d) 949.

### Point One

At the outset it must be said that, in view of the exhaustive review of the authorities on searches and seizures in *Harris v. U. S.*, *supra*, any further review seems hardly necessary. Yet, it should be borne in

mind in passing upon the arrest, search and seizure here, that the search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize a search of a house without a warrant. Protection under the Fourth Amendment to the Constitution extends to all equally, to those justly suspected or accused or as well as to the innocent. *Agnello v. U. S.*, 269 U.S. 20. Nor can a search prosecuted in violation of the constitution be made lawful by what it brings to light. *Byars v. U. S.*, 273 U.S. 28. Constitutional provisions for the security of persons and property are to be liberally construed and it is the duty of the courts to be watchful against any stealthy encroachment thereon, *Lefkowitz v. U. S.*, 285 U.S. 452. Nor may law enforcement officials enter premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials intending to connect the accused with some crime. *Go-Bart Co. v. U. S.*, 282 U.S. 344.

The record here discloses that at least an hour before the Federal officers went to the hotel in which the petitioner lived, they had received a tip from an informer that unknown persons were smoking opium in the hotel. Without securing a warrant for any person and without securing a search warrant for the hotel for any room therein, the officers proceeded to enter and to go directly to the apartment of the petitioner, testifying that "their noses just lead right to the crack of that door" (R. 73).

The apartment was surrounded and all available means of escape closed: Even then, although there could be no possible change in circumstances while an officer went to obtain a warrant, no such procedure was followed. Instead, one of the officers knocked at the door and identified himself as being a law enforcement official. Up to that time, no one, not even the informer, had seen the petitioner and there had been no conduct on her part which might give anyone probable ground for believing that she was committing an offense.

After a slight delay, the door was opened by the petitioner and the officer informed her that she was under arrest because they were going to search her premises (R. 39). Certainly no citation of authority is needed to show that the hearsay statement of an informer could not be considered in determining the existence of probable cause, either for a search or an arrest. Therefore all that remained to the officers was a sense of smell; and this court has held that the presence of a distinctive odor alone does not strip the owner of a building of constitutional guarantee against unreasonable search. *Taylor v. U. S.*, 286 U.S. 1. A multitude of decisions in the various Circuit Courts of Appeals, as reviewed in *U. S. v. Kaplan*, 89 F.(2d) 869, have adopted and followed the rule so laid down. Yet despite those authorities, the Circuit Court of Appeals went so far as to hold that under some circumstances a smell of opium fumes was second only to the well known maxim that "seeing is believing" (R. 221); and, going still further, the

court impliedly recognized the validity of the informer's tip (R. 221).

The cases of *U. S. v. Kaplan*, 89 F.(2d) 869, and especially *Lee v. U. S.*, 83 F.(2d) 195 (the facts of which are practically identical to those in the instant case) hold that smell alone from either fermenting mash or burning opium is an insufficient showing of necessary probable cause to believe that a crime was being committed within. Therefore entrance into the premises and an arrest of the person charged were unlawful as being based on insufficient probable cause. Naturally the following search and seizure would be an unlawful one.

. The trial court should under Rule 41(e) of the Federal Rules of Criminal Procedure (18 U.S.C.A. following Sec. 688) have suppressed the evidence upon the petitioner's motion. The matter was heard on affidavits and oral argument (R. 19).

The real purpose of the search was disclosed by Officer Belland while he was being cross examined by petitioner's counsel. During the cross examination, the United States Attorney requested permission to ask Officer Belland a question or two and thereafter the following ensued:

"MR. POMEROY: In making this investigation, is it not true that an investigation was made on a large shipment of opium which was brought into this territory; you in conjunction with the Federal Narcotics Service?

THE WITNESS: That is correct.

MR. POMEROY: And this is a part of that examination, is that correct?

THE WITNESS: That is correct." (R. 66)

Obviously the officers expected to find a large quantity of opium in the Europe Hotel and entered the premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for evidentiary materials, intending to connect the accused with some crime. Such practice has been universally condemned. See *Go-Bart Co. v. U. S. supra*; *Lefkowitz v. U. S., supra*; *Henderson v. U. S.*, 12 F.(2d) 528.

### Point Two

The United States Attorney's misconduct consisted primarily of (a) accusing the petitioner of committing perjury in several instances, and (b), accusing the petitioner's counsel of fabricating a story and thereafter suborning her to sign, swear and testify thereto. The first portion of his impeachment is grave enough; but the latter part, charging a fellow officer of the court with fabrication and subornation, without any evidence as a basis therefor, is altogether unjustifiable and inexcusable. Such accusations poison the wells, infuse into the imaginations of the hearers suspicion and mistrust of everything that might be said in reply, and so deprive one of the opportunity of making an effective defense.

The language of the *Berger* case is exactly in point here:

"\* \* \* It is as much his (United States Attorney)' duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average



jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. \* \* \* Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

In *Weathers v. U. S.*, 117 F.(2d) 585, during the prosecuting attorney's argument, he said: "You gentlemen heard Mrs. Weathers testify. You heard that woman get on the witness stand here and deliberately perjure herself \* \* \*." Counsel for the defendant objected and his objection was overruled. Thereupon the prosecutor continued, "Well, the jury can judge that for themselves. It was plain to be seen that the defendant or defendant's counsel, or somebody had gotten to this woman between the time she delivered the paper to us and the time she was called to testify."

In reversing the case because of prejudicial misconduct the circuit court declared:

"The court did not reprimand the prosecutor for this line of argument nor direct the jury to disregard it. Moreover, he did not comment upon it in his charge. The full force of this argument was left with the jury. It carried the imputation and inference that the defendant

and his counsel had been guilty of reprehensible conduct by influencing the witness to give false testimony. Furthermore, the jury might have concluded from his argument that counsel for the defendant had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief."

In still another way the prosecuting attorney unfairly tipped the scales of justice by introducing in argument unsworn testimony of his own. In his opening argument he testified, "Incense, she says she was burning and that was the strange odor, for the cats in the room. That is an old gag of narcotic addicts and has been for a long, long time, burning of incense \* \* \*. But the officers testified before you, and I think that you will believe them, that the odor of opium is distinctive and one you will never forget once you have smelled it. The burning of incense is only to fool other people. Suppose someone, such as you or I, had gone into the Eurpe Hotel and smelled something funny in the halls. We are not experienced with narcotics and the natural explanation to us would be that it was some sort of incense. We would say to ourselves, 'Well that is rather odd smelling incense; I don't want that around my house.' But that is the old gag of a narcotic addict" (R. 170, 171).

The argument is particularly vicious in that the petitioner never testified that she was burning incense for the cats in her room, no one testified she was a narcotic addict and no witness testified that the burning of incense was an old gag of narcotic addicts to fool people. No defendant should be subjected to a trial on

the unsworn statements of an attorney conducting a prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred of the right of cross examination and also be debarred of offering evidence in rebuttal. *Taliaferro v. U. S.*, 47 F.(2d) 699; *Lowdon v. U. S.*, 149 Fed. 673, 676.

The opinion of the Circuit of Appeals indicated that the misconduct urged would not be reviewed because defense counsel had neither objected nor excepted. Apparently rule 52, Section (b) of the Rules of Criminal Procedure (18 U.S.C.A. following Sec. 688) which states "plain errors or defects affecting substantial rights may be noticed though they were not brought to the attention of the court," was overlooked. So was section 51 of the same rules which made the taking of exceptions unnecessary. But, as pointed out in *Sunderland v. U. S.*, 19 F.(2d) 202, the making of an objection under circumstances such as these would be an idle gesture because the court had already by an instruction approved of the United States Attorney's conduct in stating to the jury, "It is not known to the attorneys or the trial judge what more could be done to properly enable the jury to perform its duty" (R. 208).

We submit that the whole purpose of the argument was to persuade the jury that the petitioner and her counsel had been guilty of conduct so reprehensible as to make them unworthy of belief. Far from having no effect upon the jury, that it was intended to prejudice the jury it is sufficient ground to conclude that in fact it did so; and it was the duty of the court even if no objection was taken, to re-

prove counsel and to instruct the jury to disregard his statements.

Above all technical procedural rules is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place even though the Government itself be there a litigant. *Pierce v. U. S.*, 86 F.(2d) 949. *Atkinson v. U. S.*, 297 U.S. 157; *Read v. U. S.*, 42 F.(2d) 636.

Respectfully submitted,

JOHN F. GARVIN

## APPENDIX

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26 U.S.C.A. Sec. 2553A provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by section 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

Title 21 U.S.C.A. 174 provides:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten



years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Federal Rules of Criminal Procedure, Rule 41 (e) (18 U.S.C.A. following 688) provide:

"**Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant."

Federal Rules of Criminal Procedure, Rule 51. (18 U.S.C.A. following 688). Provides:

"**Exceptions Unnecessary.**

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

Federal Rules of Criminal Procedure, Rule 52(b) (18 U.S.C.A. following 688)—Provides:

"**Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

FILE COPY

No. 329

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1947

ANNE JOHNSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT

**BRIEF OF PETITIONER**

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1947

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ANNE JOHNSON,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT

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**BRIEF OF PETITIONER**

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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1947

<u>ANNE JOHNSON,</u>	<i>Petitioner,</i>	}	No.329
vs.			
<u>UNITED STATES OF AMERICA;</u>	<i>Respondent.</i>		

ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT

BRIEF OF PETITIONER

**OPINION BELOW**

The opinion of the Circuit Court of Appeals (R. 218, 223) is reported at 162 F.(2d) 562.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered June 20, 1947 (R. 223), and a Petition for Rehearing was denied August 15, 1947 (R. 224). The Petition for a Writ of Certiorari was filed on September 5, 1947, and the Order granting the Writ was entered October 27, 1947. The Order limited the Writ to questions 1 and 2 presented by the petition.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules of Practice and Procedure in Criminal Cases, 37(b) and 45(a) (18 U.S.C.A. following Section 688).

### **SPECIFICATIONS OF ERROR**

(1) The Trial Court erred in denying petitioner's motion to suppress the evidence seized and used, the arrest, search and seizure having been made in the petitioner's living quarters without a warrant of arrest or search in violation of her rights under the 4th and 5th Amendments to the Constitution of the United States—the controverting affidavits of the Government witnesses showing they justified their acts upon an informer's tip and a sense of smell (R. 4-15, 19-20).

(2) The Trial Court erred in admitting over objection evidence obtained by an arrest, search and seizure in petitioner's room without a warrant of any kind in violation of her rights under the 4th and 5th Amendments to the Constitution of the United States because the sole basis of the Government officers' acts was an informer's tip that an unknown person was smoking opium somewhere in the Europe Hotel and the arresting officers' sense of smell.

### **CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED**

The constitutional and other provisions involved are set out in the Appendix following page 22, *infra*.

### STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Washington on a four count indictment, two counts of which charged purchase of eighty-five grains of smoking opium and forty-one grains of yen shee partially prepared for smoking, and two counts of which charged receipt and concealment of the same opium and yen shee which had theretofore been brought into the United States contrary to law. Title 26 U.S.C.A. 2553a and Title 21 U.S.C.A. 174 (R. 2-3, 20-21).

She was sentenced to imprisonment for eighteen months and to pay a fine of \$250.00 on the first count and to imprisonment for one day and to pay a fine of \$1.00 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentences on the first count. Imposition of sentence was suspended on the second count and the petitioner placed on probation for five years, commencing on the date the sentence was imposed (R. 23-26). This judgment was affirmed by the Circuit Court on appeal (R. 223).

Before trial petitioner moved to suppress and withhold from the jury all evidence obtained by police officers and United States narcotics officers on the 8th day of April, 1946, from her sleeping room because the search and seizure were unlawful and in violation of her rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 4, 5). In support of her motion, petitioner filed an affidavit which showed the following facts:

She resided in Room 1 at the Europe Hotel in Seattle, Washington. About nine o'clock at night on the 8th day of April, police officers and Federal narcotics officers forced their way into her room and unlawfully and without a search warrant or any other authority of law seized evidence which they intended to use on trial. At the time she was in bed, undressed and asleep. She was awakened by the officers knocking and kicking at the bottom of her door. She dressed, opened the door and then the officers entered and proceeded to search her room at once. After about forty-five minutes, they found a paper sack in her bed containing an opium bottle pipe and some opium. The yen shee was found in a suitcase which had been left with her by a lodger, a sick man who told her he took opium for his heart. After hearing the officers knock at the door, she removed a paper bag containing the opium and pipe from the suitcase and concealed it in her bed (R. 6-9).

In opposition, the Government submitted affidavits by Federal Officers Graben and Goode, and Police Officer Belland (R. 10-16). Substantially the following facts were set out:

On April 8, 1946, upon receiving information from a confidential informer that unknown persons were smoking opium in the Europe Hotel, four agents and a police detective went to the premises at about 8:30 at night. Agent Giordano and Policeman Belland entered the hotel and *immediately detected a strong odor of smoking opium* which they were easily able to follow up a flight of stairs to room one, the manager's (petitioner's) living quarters. The other agents were

summoned and Officer Giordano stepped down the corridor to check the fire escape. Detective Belland knocked on the door and, in response to a question, identified himself as an officer. A short time thereafter petitioner opened her door. Since the odor of smoking opium was very strong in the room, the officers placed petitioner under arrest and started to search. Under the bedcovers, they found the opium, yen shee, a makeshift opium pipe, which was still hot, and other smoking paraphernalia.

The District Court, after considering all the affidavits and listening to the argument of counsel, denied the motion (R. 19-20).

At the trial, something new was added; and Officer Belland, in particular, broadened his story. On the night of April 8 at about 7:40 (R. 59) a confidential informer, who happened to be a narcotics user and rival hotel operator (R. 67, 63-65) told Belland that someone was smoking opium in the Europe Hotel at that time. Belland had picked up the informer at his place of business (R. 65), sent him into the hotel to interview the manager about tenants she might suspect of using opium (R. 60), and then after receiving the tip drove him back to his place of business. After that Belland got in touch with four Federal agents and communicated to them all the information he had received. The officers first completed another assignment and then proceeded to the Europe Hotel, arriving at approximately 8:45 o'clock (R. 72).

No attempt was made to obtain a warrant for anyone's arrest or a warrant authorizing search of any room.



Upon arrival Officers Belland and Giordano entered the hotel to interview the manager. They detected a strong odor of opium *as they came up the stairs* and it led to the petitioner's room. The officers then deployed their forces. Giordano was sent to the fire escape to guard the room's only window (R. 80, 97). Officer Moodie was instructed to remain at the outside entrance and to watch the windows (R. 92). Belland, Goode and Graben assumed their stations at the door. Belland knocked and, in response to an inquiry, identified himself as an officer. He was asked to wait a minute and did so. He rapped again and was again asked to wait a minute, and then he heard "some shuffling or noise in the room" (R. 38). Shortly after, petitioner came to the door and opened it. Belland told her that he wanted to talk about the opium smell in the room, that he wanted her to consider herself under arrest *because* they were going to search the place. Officers Graben, Goode and Giordano then searched the room while Belland talked to the petitioner. Graben found the narcotics and smoking equipment under the covers of the petitioner's bed. Before the door was opened, Giordano testified he heard "some rustling" after Belland identified himself (R. 93).

Even after the door had been opened and the officers had detected a strong odor of smoking opium, there was no attempt to obtain either a warrant of arrest or a warrant authorizing search of petitioner's premises.

During the cross examination of Officer Belland,

the United States Attorney interrupted and the following colloquy ensued:

"MR. POMEROY: In making this investigation, is it not true that an investigation was made on a large shipment of opium which was brought into this territory; you in connection with the Federal Narcotics Service?

THE WITNESS: That is correct.

MR. POMEROY: And this is a part of this examination. Is that correct?

THE WITNESS: That is correct" (R. 66).

With regard to the informer, there was testimony that he did not know who was smoking opium in the Europe Hotel nor where the act, if any, was taking place. He did not suspect Petitioner and was surprised that the odor led to her room (R. 57, 58). There was no testimony on the part of anyone to indicate that petitioner had either by record or reputation had any connection with narcotics either as a dealer or a user. Police Officer Belland testified that he met her for the first time on the night of the arrest (R. 36, 37).

Officer Belland's testimony regarding opium odors was as follows:

"Q. How long would this odor remain in a room after somebody smoked in a room—one person let's say?

A. It would remain quite a while. It would saturate the curtains; there is a stench around there that is pretty hard to get rid of.

Q. Would it stay there for a long time?

A. That is right.

Q. How long would the opium smell remain after a person had been smoking there say for an hour?

A. Oh, you might notice it there several hours afterwards." (R. 74)

The testimony of all the officers proved that over an hour's length of time elapsed between the receipt of their information and the arrest of petitioner.. It also demonstrated beyond any doubt that after petitioner's door was opened there was ample opportunity to obtain a warrant. Five officers were present, all entrances and exits to the room were guarded, there was no possibility of escape or concealment nor of any change in the situation while some of them watched and others procured a search warrant (R. 80, 92, 93, 97).

All of petitioner's objections to the reception of the evidence seized were overruled and her motion for directed verdict denied. The basis of the objections and motion was the illegality of the search and seizure (R. 41, 107, 165).

**ARGUMENT****I.**

It has always been held that the use of evidence unlawfully seized should be suppressed upon motion for that purpose prior to trial; and it has been uniformly held that one's domicile may not be invaded for an arrest, search and seizure on the basis of an informer's tip combined with a sense of smell.

The record at the time the Court had under consideration Petitioner's Motion to Suppress showed these salient facts:

1. The arrest, search and seizure occurred in the night time in the petitioner's living quarters in her hotel (R. 6, 7, 11, 13, 15).

2. There was neither a warrant of arrest nor a search warrant (R. 7).

3. The officers acted upon information from a confidential informer that unknown persons were smoking opium in the Europe Hotel (R. 11, 12, 13).

4. Upon entry, the officers detected a strong odor of smoking opium which they were easily able to follow to the petitioner's door (R. 11, 12, 13, 14, 15):

5. The officers surrounded all means of exit, knocked on the door and identified themselves. After a short delay the door was opened and they were admitted (R. 11, 12, 13).

6. The fumes of opium in the room were very strong; so the petitioner was immediately placed under arrest, a search instituted and the seizure made (R. 11, 13, 15).

7. The opium and smoking equipment were con-

cealed under the covers of the petitioner's bed, none of it was in plain sight (R. 11, 13, 15).

8. There was ample time to obtain either a warrant of arrest or a search warrant before the petitioner was arrested and ample opportunity to obtain the search warrant for her living quarters after the arrest without there being any change in the circumstances.

Rule 41(e) of the Federal Rules of Criminal Procedure provides: a person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized \* \* \* to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. \* \* \* The judge shall receive evidence on any issue of fact necessary to the decision of the motion (Title 18 U.S.C.A. following Sec. 688). This rule is a restatement of existing law and practice with certain exceptions not now at issue. *Agnello v. United States*, 269 U.S. 20; *Gould v. United States*, 255 U.S. 298.

All the authorities agree that there is no right to search a dwelling without a search warrant except as an incident to a lawful arrest. *Weeks v. U.S.*, 232 U.S. 383; *Go-Bart Importing Co. v. U. S.*, 282 U.S. 344.

In the absence of a search warrant, search and seizure in a home can only be justified as an incident to a lawful contemporaneous arrest therein. *Agnello v. U. S.*, *supra*. If the search is prosecuted in violation of the Constitution, it cannot be made lawful by what it first brings to light. *Byars v. U. S.*, 273 U.S. 28. And



the fruits of an illegal search are not admissible in evidence. *Weeks v. United States*, 232 U.S. 383.

Necessarily the government must take its stand upon the proposition that the officers here possessed sufficient probable cause to arrest the petitioner and thereafter lawfully to search her room as an incident to the arrest. With respect to the existence of probable cause, or reasonable grounds for an arrest, no hard and fast rule can be laid down. Each case is to be decided on its own facts and circumstances. *Go-Bart Importing Co. v. U. S.*, *Supra*. However, it is well settled that an arrest to justify a search of a home must be legal. No authority need be cited for the fundamental propositions that probable cause must exist before and not after the search. And that there must be an actual arrest to justify a search. Obviously then, the determinative question here is whether or not the arrest was legal.

The evidence upon which the officers acted in making their arrest, search and seizure consisted of an informer's tip and a sense of smell. The books hold that the hearsay statement of an informer cannot be considered evidence by a magistrate in support of an application for either a warrant of arrest or a warrant of search. *Veeder v. U. S.*, 252 Fed. 414; *Davis v. United States*, 35 F.(2d) 957. Evidence justifying the issuance of any warrant must be such as would be admissible upon the trial proper. *Wagner v. United States*, 8 F.(2d) 581. That is the specific requirement of the Fourth Amendment. If the tip of an informer repeated by an officer to a magistrate may

not be accepted as evidence of probable cause for a warrant, petitioner is at a loss to understand how it can rise above its own source merely because an officer relies upon it for an arrest.

Yet in view of some of the decisions stating that an arrest may be made upon hearsay evidence, *U. S. v. Hietner*, 149 F.(2d) 105, the proposition must be squarely faced. Even though we accept such an abhorrent premise, which seems a complete surrender of principle to expediency, the hearsay acted upon must achieve a certain dignity, if that not be a contradiction in language. The tip or information must be definite and specific enough to inculcate a certain person, either by name or description. Place must be disclosed. Otherwise there is nothing upon which any officer can act. The tip becomes mere gossip and confusion is superimposed upon tale bearing. In this connection the caveat of the *Carroll* case 267 U.S. 132, must always be remembered

"Guarantee of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between the search of a store, dwelling house, or structure in respect of which a proper official warrant may be obtained and a search of a ship, motorboat, wagon or automobile for contraband goods where it is not practicable to secure a search warrant \* \* \* because the vehicle can be quickly moved \* \* \*"

A reading of the cases approving arrest upon hearsay discloses they are usually in the open where the means of escape are readily available, and the matter

therefore becomes one of urgency. But when a person's home is involved, stricter requirements of reasonableness are to apply. *Davis v. U. S.*, 328 U.S. 582; *Harris v. U. S.*, 331 U.S. 145.

An analysis of the so-called tip here amply demonstrates its shoddy and unreliable quality. It came from the lips of a narcotic addict who was, in addition, a rival hotel operator (R. 63, 64, 67). The sum total of the information was that unknown persons were smoking opium somewhere in the hotel. Who were the persons? Unknown. What rooms were involved? Unknown. The officers themselves apparently deemed the tip to be only of enough value to justify an interview with the manager of the hotel (R. 10, 14, 38). No one would hazard a decisive step in the ordinary everyday affairs of life in reliance upon such vague chatter. Could any officer, having due regard for the Constitution of the United States, dare risk an arrest, search and seizure upon mere scandal-mongering? Giving the "confidential information" its full weight, it indicated only a smell in a hotel. The smell was perceptible to the officers upon entry. Therefore, in determining the existence of probable cause here the informer's tip adds nothing.

It was after entry for the specific purpose of interviewing the manager of the hotel that the odor of opium led, like the well defined trail of prohibition days, directly and unerringly to petitioner's door. There seemed to be no need to stop at any other room even though the smell permeated hall and corridors. There was great variance between the affidavits of the officers controverting petitioner's motion to suppress

and their later testimony respecting the smell of opium; but more of that hereafter.

So we find the officers at petitioner's door, and their subsequent entry into her room, her arrest and the following search and seizure solely because of sensitive and discriminating olfactory nerves. The officers saw nothing. They saw no one. Prior to their knocking on petitioner's door and demanding entrance, they heard nothing. No evidence of any kind came to any of those senses except that of smell. Was opium then being smoked in petitioner's room? Who could tell? Had it been smoked by someone a few minutes before and the addict departed the scene? No one could say. Was there any one in the room to be searched? There was no evidence thereof. Even after the door of the petitioner's room had been opened in response to the officers' knock and personal identification, the only evidence impinging on their five senses was the odor of opium. An arrest in one's home and a search and seizure incidental thereto upon such meager evidence fails to comply with the law.

Special attention is called to *U. S. v. Lee*, 83 F.(2d) 195, the facts of which are almost all fours with those of the instant case. There was the well known informer's tip plus a sense of smell which led the officers to the defendant's door. After the officers had taken their various stations, the doorbell was rung and the door opened by a Chinese who was immediately taken into custody. Thereafter, without consent, the rooms were entered to a point where an opium outfit was visible on the bedroom dresser. The defendant was not present at the time but was arrested later. In hold-

ing that the defendant's motion for suppression of evidence should have been granted the Court said:

"Nor was there probable cause to believe that an offense was being committed in the presence of the officers so that an arrest could be lawfully made without a warrant. According to the affidavit and testimony of the Government agents, they proceeded first upon advice of an informer and upon the smell of the opium at a crack in the door. The first was inadequate to secure a warrant. Assuming that there was an odor of opium, as testified, the odor would be confined to the room. The claim that the government agent smelled it at the outer door is an insufficient showing of the necessary probable cause to believe that a crime was being committed within. Of course, the evidence illegally obtained may not be used to support the claim of probable cause. *Wakkuri v. U.S.* (C.C.A. 6) 67 F.(2d) 844. See *Garske v. U.S.* (C.C.A. 8) 1 F.(2d) 620, 625."

The same situation arose in a distilling case. *Kaplan v. U. S.*, 89 F.(2d) 869. The officers testified that the odor of fermenting mash grew stronger as they approached the defendant's dwelling and became fainter as they receded. Upon rapping at the door they were admitted by the defendant's wife who was taken into custody, and they thereafter conducted a search which disclosed a liquor still in the premises. The Court again held that the complaints of neighbors, (informers' tips) together with a sense of smell was an insufficient showing of probable cause that an offense was then being committed upon the defendant's premises. Also see *Alvau v. U.S.*, 33 F.(2d) 467.

The Government's brief in opposition to the Peti-



tion for a Writ of Certiorari has foreshadowed the position it intends to take. It was said that the decision in the *Lee* case stemmed from a misreading of a portion of this Court's opinion in *Taylor v. U. S.*, 286 U.S. 1, and later decisions in the same Circuit indicated doubts as to the correctness of the *Lee* decision. Such a statement can scarcely be construed as a compliment for either the Supreme Court's power of expression or the Circuit Court's capacity for reading and understanding. Petitioner is convinced that the judges of the Second Circuit did not misread, misunderstand or misapply the *Taylor* case. The *Lee* case was quoted, approved and followed in the *Kaplan* case and in *Kind v. U. S.*, 87 F.(2d) 315. *Cheng Wai v. U. S.*, 125 F.(2d) 915, and *U. S. v. Kronenberg*, 134 F.(2d) 483, are clearly distinguishable upon the facts and there was much more evidence coming to the officers' attention than what entered through their noses. In *Taylor v. U. S.*, *Supra*, this Court held that the presence of a distinctive odor in a building does not alone strip the owner thereof of constitutional guarantee against unreasonable search. With equal force it may be said that the presence in a home of a distinctive odor alone does not strip the home owner of his constitutional guarantee against unreasonable arrest.

If an officer's nose can, through the devious route of a search incidental to an arrest based on probable cause, lead him into a dwelling where the constitution declares he may not enter except upon strict compliance with its plain requirement, then the 4th Amendment becomes nothing but a jumble of words signifying nothing.

## II.

An informer's tip that some unknown is smoking opium in a hotel, combined with an officer's sense of smell which led to the door of one's living quarters plus some slight noise after a knock for admission is not sufficient probable cause to justify a lawful arrest and incidental search and seizure in one's home.

The Government's evidence at the trial added not a barley-corn of competent matter to establish the existence of probable cause. It did prove that the informer's tip came from a very doubtful source and was probably made from unworthy motives. It established the fact that the search was an exploratory one because Officer Belland testified that the investigation made of petitioner's premises was part of a search for a large shipment of narcotics which had just arrived in the state (R. 66). Belland's own mouth condemns the search as an exploratory one, a quest for opium; and this Court has always held that, where law enforcement officers enter ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for materials to connect someone with some crime, the search amounts to an illegal invasion of privacy and is repugnant to the 4th Amendment. *Go-Bart v. U.S.*, *supra*; *Lefkowitz v. U.S.*, 285 U.S. 452; *Harris v. U.S.*, 381 U.S. 145.

What can be said of the officers refusal or failure to obtain a search warrant for petitioner's premises just before petitioner was arrested, or afterwards, except lack of familiarity with the provisions of the 4th Amendment or a callous disregard therefor? Cer-

tainly the whole proceeding might have taken a little longer or been inconvenient. Never has it been suggested by this Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess; and search should not be made without a warrant where the opportunity for the issuance of a warrant exists. *Carroll v. U. S., supra, Taylor v. U. S., supra, Harris v. U. S., supra.*

Petitioner goes further and declares that the testimony of Officer Belland (R. 39) indicates that there was no arrest at all. The record is devoid of any evidence that she was placed under arrest for the commission of an offense. She was told to consider herself under arrest *because* the officers were going to search her room. The personal restraint imposed upon her was merely a pretext for invading her room.

There is a strange lack of uniformity in the officer's testimony respecting the sounds in the petitioner's room after Belland rapped and identified himself as an officer. On June 28, 1946, when Officers Belland, Graben and Goode, all of whom were at the petitioner's door, swore to affidavits in opposition to her motion to suppress, not one of them even so much as mentioned hearing a noise of any kind after Belland had knocked. Officer Giordano, who at the trial testified to hearing a "rustling" was upon the fire escape and not at the door at the time entrance was sought, according to the testimony of Officers Graben (R. 97) and Goode (R. 80, 81). Moreover neither Officers Goode nor Graben in their controverting affidavits or in their testimony at the trial testified to hearing any noise of any kind.

Assuming, for the sake of argument, that Belland did hear "noise or shuffling" and Giordano did hear "rustling," such testimony does not fill in the yawning gap. Leaving aside petitioner's testimony that she was in bed at the time entry was sought and it was necessary for her to put on some clothes before going to the door, it is doubtful if any one of us could call upon even the most innocent person in the world and not hear some "noise or shuffling or rustling" as he came to the door in response to our summons.

Curiously enough the Circuit Court of Appeals in its opinion characterized the sound in the following language: "There were sounds of someone scurrying around for several minutes after which the officer was admitted \* \* \* before admission there ensued some minutes of scurrying within."

No witness testified at any time that there were sounds of someone scurrying within the room, and no witness testified at any time that any noise or sound lasted several minutes. Nor was there any testimony that the officers heard sounds or noises which led them to believe that someone within was attempting flight, or concealment or destruction of prohibited matter.

It is to be remembered, too, that when the door of the room was opened there was no contraband or smoking equipment in sight. Regarding the odor of opium, the controverting affidavits all state that there was a strong smell of opium detected by each officer upon entry into the hotel, Belland stating it was *immediately upon entry* (R. 11, 12, 15). At the trial there was no such testimony. Each officer swore that



the smell was noticed either during the ascent to the second floor or upon arrival upstairs (R. 38, 80, 92, 97). Strange to say, Graben testified Giordano told him the odor of opium was coming out of the premises upstairs in front (R. 96). The controverting affidavits all said that there was a very strong odor of opium upon the opening of petitioner's door. There was no such testimony at the trial proper.

How can such things be? Between affidavit time and trial date, currents had shifted, and odors were floating upstairs instead of sinking downstairs. Which of these mutually contradictory sworn statements is to be chosen as the corner stone for edifice of probable cause?

There was no testimony that the petitioner who, if the affidavits and testimony tell a truthful story, had been smoking opium for about an hour, appeared to be under the influence of narcotics. Not a word was said regarding her articulation, her responses or the condition of her eyes. The officers spent many minutes talking to her but not one of them suggested the presence of a tell tale odor of opium upon her breath.

So at the close of all the evidence the Government winds up with just what it had when it started, an informer's tip and a sense of smell. Can an arrest of one in his own home be justified upon such a meager showing? Petitioner has been unable to find any decision of an appellate tribunal which so holds. Grant the officers acted in good faith; that is not enough. The good intentions of a policeman may not be substituted



for a judicial authorization. A contrary holding will achieve the novel and startling result of making the scope of search without warrant broader than an authorized search.

In closing petitioner urges that even though the Court considers there was probable cause for a lawful arrest, one may seriously question whether that justified a search of her room without a warrant. As was said in the dissenting opinion in *Harris v. U. S.*, *supra*, "The Constitution protects against unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of the authority to search. This is especially true where officers are in a position to obtain lawful authority to search without there being any change in the circumstances under which one was arrested. A different holding makes for easy invasion of safeguards which the Fathers reserved to the citizens. No longer is a magistrate's independent decision upon sworn testimony required for the search of a home. Over zealous officers can employ informers to spy out the land, peek into neighbors' homes and carry the news back to those who sent them. An immediate lawful arrest could be effected and a lawful search made as incident thereto. The 4th Amendment would be relegated to the limbo of lost causes, serving naught except thematic material for historical essays on what the Bill of Rights once meant to an aroused people who insisted upon its incorporation into the fundamental law of our land. *Weeks v. U. S.*, *supra*."

**CONCLUSION**

It is respectfully submitted that the trial court committed error and that the judgment of conviction should be reversed.

Respectfully submitted,

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## APPENDIX

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Federal Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Title 26 U.S.C.A. Sec. 2553A provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package con-

taining any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

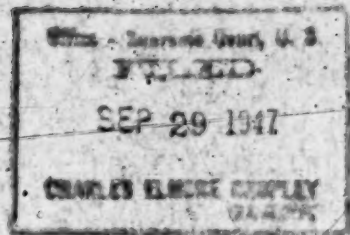
Title 21 U.S.C.A. Sec. 174 provides:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Federal Rules of Criminal Procedure, Rule 41(e) (18 U.S.C.A. following 688) provides:

"Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant."

FILE COPY



No. 329

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

---

**ANNE JOHNSON; PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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(I)

# **In the Supreme Court of the United States**

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**No. 329**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINION BELOW**

The opinion of the circuit court of appeals (R. 218-223) is reported at 162 F. 2d 562.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered June 20, 1947 (R. 223), and a petition for rehearing was denied August 15, 1947 (R. 224). The petition for a writ of certiorari was filed September 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioner and the search of her room incident thereto.

2. Whether summation by government counsel to which no objection was taken at the trial constituted reversible error.

#### STATEMENT

Petitioner was convicted on a 4-count indictment returned against her in the United States District Court for the Western District of Washington charging the purchase and concealment of narcotics (R. 2-3, 20-21). She was sentenced to imprisonment for eighteen months and to pay a fine of \$250 on the first count and to imprisonment for one day and to pay a fine of \$1 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentence on the first count. Imposition of sentence was suspended on the second count and petitioner was placed on probation for five years, commencing on the date sentence was imposed (R. 23-26). The judgment was affirmed on appeal (R. 223).

Petitioner moved before trial to suppress the narcotics on which the prosecution was based on the ground that this evidence had been obtained as the result of an unlawful search and seizure

(R. 4-9). In opposition to the motion, the Government submitted affidavits by federal narcotic agents and a detective of the Seattle police department setting forth the following facts (R. 10-16):

On April 8, 1946, the agents received information that unknown persons were smoking opium in the Europe Hotel. Three agents and the detective went to the hotel at about 8:30 p. m. Two of the men entered for the purpose of interviewing the manager. They detected a strong odor of smoking opium which they were easily able to trace to Room 1, the manager's room. They sent for the other agents and one of the men went down the corridor to watch the fire escape. The detective knocked on the door of the room and, in response to a question, identified himself. A few minutes later petitioner opened the door. Since the odor of smoking opium was very strong in the room, the officers placed petitioner under arrest and started to search the room. Petitioner sat down on the bed. Some time later, petitioner's mother entered the room and petitioner stepped into the hallway with the detective. She told him that she would turn over the opium if he would get her mother out of the room. In the meantime, however, one of the agents had turned back the bed covers and discovered in the bed a one-ounce ointment jar containing 85 grains of opium prepared for smoking with no marks or labels, and a makeshift opium pipe which was hot. They also found 23 grains of yen shee (partially

smoked opium, see R. 46-47) lying loose on a Chinese brass tray, a metal lamp base, a metal funnel, and two yen hocks (used for dipping into an opium jar, R. 40).

In support of her motion, petitioner submitted an affidavit in which she stated that she was keeping a suitcase for one Solomon Zissu who had occupied a room in her hotel; that she knew the suitcase contained an opium pipe and that Zissu took opium for his illness; that when the officers knocked on the door she took the pipe out of the suitcase and hid it in her bed; that the officers searched her room for 45 minutes; and that yen shee was discovered in the suitcase, which contained men's clothing (R. 6-9). She also submitted an affidavit by one Kay Doran, who lived in the hotel, to the effect that Doran told the officers that the odor which they smelled was the aroma of incense used by petitioner to keep down the odor from her cats (R. 16-18).

The district court denied the motion to suppress (R. 19-20). At the trial the officers repeated in substance the account of petitioner's arrest and the search set forth in their affidavits (R. 36-47, 79-83, 91-95, 96-99). Petitioner's motions at the trial to exclude the seized narcotics were denied (R. 41, 107, 165). The agents testified that the suitcase which they searched contained women's clothing (R. 88-89, 93-94), that only a few grains of yen shee were found in the suitcase (R. 81, 85, 89, 94), and that the



yen shee which formed the basis of counts 3 and 4 of the indictment was lying loose on a Chinese tray found under the bedcovers with the opium and the pipe (R. 81-82, 85, 98). Petitioner took the stand and repeated in substance the version of events set forth in her affidavit that she had taken the opium and the pipe from the suitcase left with her by Zissu (R. 116-132).

#### ARGUMENT

Petitioner contends (Pet. 7-8, 12, 13-17) that the officers did not have sufficient probable cause to justify her arrest and the search of her room incident thereto. We submit, however, that, as the court below held (R. 220-221), the arrest was clearly justified. The agents had information that someone was smoking opium in the hotel; the telltale odor of opium led them to petitioner's room; the odor was stronger within the room than without; only petitioner was in the room when the door was opened; no one had left the room, all exits having been under observation. Under these circumstances, the officers had reasonable grounds to believe that petitioner had committed a felony and thus had probable cause to arrest her. *Pong Ying v. United States*, 66 F. 2d 67 (C. C. A. 3); *United States v. Kronenberg*, 134 F. 2d 483 (C. C. A. 2).

The cases on which petitioner relies (Pet. 15-16) do not for the most part support her position. In *Taylor v. United States*, 286 U. S. 1, 6, this Court

expressly recognized that "officers may rely on a distinctive odor as a physical fact indicative of possible crime," but held that this fact would not justify the search of a building without a warrant and without the arrest of any person.<sup>1</sup> The decision in *United States v. Lee*, 83 F. 2d 195, 196 (C. C. A. 2), in which the Second Circuit held that the odor of opium is insufficient cause to justify an arrest, stems from a misreading of that portion of this Court's opinion in the *Taylor* case referred to above. Later decisions in the Second Circuit indicate doubts as to correctness of the *Lee* decision. See *Cheng Wai v. United States*, 125 F. 2d 915, 916 (C. C. A. 2); *United States v. Kronenberg*, 134 F. 2d 483 (C. C. A. 2).

2. Petitioner also contends (Pet. 8, 9, 12, 17-21) that summation by government counsel constituted reversible error, although no exception thereto was taken at the trial. The circuit court of appeals criticized the summation but held that it did not require reversal of petitioner's conviction in view of the absence of objection and the clear proof of petitioner's guilt (R. 221-223).

We submit that the court below properly declined to reverse petitioner's conviction on this ground. The opening argument by government counsel was not objectionable. The reference to burning incense (R. 170-171), of which petitioner complains (Pet. 19), was not extraneous since

<sup>1</sup> In this case the Court said (p. 5): "No one was within the place and there was no reason to think otherwise."

petitioner's counsel had cross-examined one of the agents as to whether Kay Doran had not told him that the odor in the corridor was that of burning incense used to keep down the odors from petitioner's cats (R. 88).<sup>2</sup> The evidence at the trial clearly established that petitioner's version of events was false, and the prosecutor's statements that her story did not hold together (R. 170) and that her credibility could be successfully attacked (R. 172, 173; see Pet. 5) were fully justified.

The portions of the summation which the circuit court of appeals disapproved—statements to the effect that defense counsel had concocted petitioner's defense (see Pet. 5)—occurred in the closing argument by government counsel. They obviously reflect the reaction of the prosecutor to the summation by defense counsel, who accused the agents of shifting their stories (R. 175-177, 190-191), injected extraneous issues into his argument (R. 174, 175-180), and discussed alleged facts not in evidence (R. 186). The first part of government counsel's closing argument, in which he characterized the defense summation as testimony by counsel (R. 192), has considerable basis in the record.

During the argument by defense counsel, and the closing argument by government counsel, the trial judge told the jury to disregard any state-

<sup>2</sup> In connection with her motion to suppress, petitioner had submitted an affidavit by Kay Doran to this effect. See *supra*, p. 4.

ment not supported by the evidence (R. 174-175, 192-193), and he repeated the caution in his charge (R. 207). After the judge concluded his charge, he specifically asked counsel if they had further suggestions or objections, and both counsel replied that there were none (R. 209). Moreover, the evidence of petitioner's guilt was overwhelming. Under the circumstances, therefore, the circuit court of appeals properly held that the argument of government counsel did not constitute reversible error. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 239-240; *Dunlop v. United States*, 165 U. S. 486, 498; *McFarland v. United States*, 150 F. 2d 593, 594 (App. D. C.), certiorari denied, 326 U. S. 788; *United States v. Dubrin*, 93 F. 2d 499, 506 (C. C. A. 2), certiorari denied, 303 U. S. 646.

#### CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied,

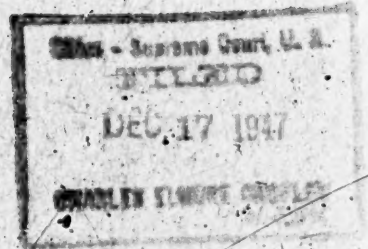
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SEPTEMBER 1947.

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No. 329

**In the Supreme Court of the United States**

OCTOBER TERM, 1947

ANNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES



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# **In the Supreme Court of the United States**

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**BRIEF FOR THE UNITED STATES**

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**OPINION BELOW**

The opinion of the circuit court of appeals (R. 218-223) is reported at 162 F. 2d 562.

**JURISDICTION**

The judgment of the circuit court of appeals was entered June 20, 1947 (R. 223), and a petition for rehearing was denied August 15, 1947 (R. 224). The petition for a writ of certiorari was filed September 5, 1947, and on October 27, 1947, this Court granted the petition, "limited to ques-

(1)

tions 1 and 2 presented by the petition for the writ" (R. 226). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also, Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

#### QUESTION PRESENTED

Whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for the contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room.

#### CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution provides—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Acts of January 17, 1914, c. 9, 38 Stat. 275, May 26, 1922, c. 202, 42 Stat. 596, June 7,



1924, c. 352, 43 Stat. 657, and June 14, 1930, c. 488, 46 Stat. 585, provides in part as follows:

SEC. 2. [42 Stat. 596] \* \* \*

(b) [21 U. S. C. 173] That it is unlawful to import or bring any narcotic drug<sup>1</sup> into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. \* \* \*

(c) [21 U. S. C. 174] That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years.

<sup>1</sup> Defined in Section 1 as meaning "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine."

(d) [21 U. S. C. 173] Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; \* \* \*

(f) [21 U. S. C. 174] Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

SEC. 3. [38 Stat. 275, 276; 21 U. S. C. 181] That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine,<sup>1</sup> and the burden of proof shall be on the claimant or the accused to rebut such presumption.

<sup>1</sup> The first Act of February 9, 1909, 35 Stat. 614, made it unlawful to import opium in any form or any preparation or derivative thereof after April 1, 1909, with the proviso that opium and preparations or derivatives, other than opium prepared for smoking, were permitted to be imported for medicinal purposes under regulations prescribed by the Secretary of the Treasury. Under the amendment of May 26, 1922, § 2 (b), *supra*, 42 Stat. 596, only crude opium and coca leaves may now be lawfully imported.

SEC. 5. [42 Stat. 596, 597; 21 U. S. C. 180] That no smoking opium or opium prepared for smoking shall be admitted into the United States or into any territory under its control or jurisdiction for transportation to another country, or be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or for any other purpose; and except with the approval of the Commissioner of Narcotics, no other narcotic drug may be so admitted, transferred, or transshipped.

Section 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)) provides—

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a)<sup>2</sup> except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

<sup>2</sup> "Opium, coca leaves, any compound, salt, derivative, or preparation thereof."

## STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Washington in four counts charging the unlawful purchase and concealment of narcotics (R. 2-3). Count 1 (R. 2) charged that on or about April 8, 1946, petitioner purchased 85 grains of opium prepared for smoking, which was not then in or from the original stamped package, in violation of Section 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)); the second count (R. 2) charged that on the same date petitioner received and concealed 85 grains of opium, knowing that it had been unlawfully imported into the United States, in violation of Section 2 (c) of the Narcotic Drugs Import and Export Act (21 U. S. C. 174); the third and fourth counts (R. 3) related to 41 grains of yen shee, partially smoked opium, and charged similar violations of the statutes in respect of that narcotic. Upon conviction, she was sentenced to imprisonment for eighteen months and to pay a fine of \$250 on the first count and to imprisonment for one day and to pay a fine of \$1 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentence on the first count. Imposition of sentence was suspended on the second count and petitioner was placed on probation for five years, commencing on the date sentence was imposed. (R. 23-26.) The judgment was affirmed on appeal (R. 223).

The sole issue before the Court relates to the lawfulness of the arrest of petitioner and, as an incident to the arrest, the search of her room and seizure of opium and devices for smoking it. Prior to trial, on June 26, 1946, petitioner moved to suppress all evidence seized from her room on April 8, 1946, on the ground that the search and seizure were unlawful (R. 4-6). Affidavits in support (R. 6-9, 16-19) and in opposition (R. 10-16) to the motion were filed, and on July 20, 1946, the Court entered an order denying the motion (R. 19-20; see also, R. 109-110). At the trial, petitioner unsuccessfully renewed the motion when the seized items were offered in evidence (see R. 41), and again at the close of the Government's case (R. 106-107, 109-110) and at the close of all the evidence (R. 165). The evidence adduced at the trial on the issue of probable cause for her arrest, may be summarized as follows:<sup>3</sup>

Petitioner owns and operates the Europe Hotel in Seattle, Washington (see R. 116-117). There are thirty rooms and twelve apartments in the hotel, and, at the time of the trial, there were approximately thirty-five tenants (R. 116). Room 1 in the hotel is a small room, no larger than 9' x 12' (R. 115, 54), which is near the head of the stairway leading from the street entrance to the hotel (R. 116, 146).<sup>4</sup> This room was used by peti-

<sup>3</sup> See, *infra*, pp. 37-38.

<sup>4</sup> Apparently, the hotel itself was reached by means of a stairway from the street level.



tioner as a business office and as her sleeping room (R. 116, 149). The door to the room had three glass panels, each about eight inches wide, which had a silver coating on them (R. 146-147, 150-151). Petitioner was able to see through the panels from inside the room (R. 124), but a person on the outside could not see into the room, except that "a little bit in one corner you can see through it" (R. 151; cf. R. 124).

Detective Belland, who was in charge of the narcotic squad of the Seattle police department (R. 36), testified that about 7:30 p. m. on April 8, 1946, one Odekirk, a user of narcotics (R. 67), informed him "that there were unknown persons smoking opium in the Europe Hotel at that time" (R. 38, 58-59). Odekirk told Belland that "he came up there and the place was reeking with opium smoke; that someone was smoking up there at that time" (R. 57). Pursuant to Belland's directions, Odekirk returned to the Europe Hotel "for the purpose of interviewing the management of that hotel to find out if they would tell him, or who in that hotel was a user of opium or might be smoking opium" (R. 58, 60). Belland testified that "I saw him [Odekirk] enter the hotel. He couldn't any more than have got up to the head of the stairs when he came right down again" (R. 58, 60). Belland also testified that Odekirk knew that someone was smoking opium, "because he could smell it right in the hallway," but he did not know who was doing so or in

what room (R. 59-60, 69). These events took about 15 minutes (R. 69-70), and Belland then immediately contacted the federal narcotic agents and gave them the information he had received (R. 59, 70). The agents were in the process of making an arrest, but shortly thereafter Belland and four narcotic agents (R. 37, 102) proceeded to the Europe Hotel (R. 37, 70), arriving there between 8:30 and 9:00 o'clock (R. 72).

Belland, who had 12 years' experience with narcotics (R. 61, 36), and narcotic agent Giordano, who had 3 years' experience in this field (R. 91), entered the hotel, while the others remained outside. Belland testified (R. 38)—

We went in there for the purpose of interviewing the manager of that hotel to ascertain what information she might give us on anyone that would be using narcotics in there at that time. As we came up the stairs there was a strong odor of opium smell. It led us right to Room Number 1, the room of the defendant. As I stood in front of the door there was a strong odor coming out between the sill and the door.

Agent Giordano testified (R. 92) similarly that—

As we started up the stairs I got a distinct odor of smoking opium. As I proceeded up the stairway the odor became more apparent. As I hit the top of the stairs I just followed the odor to the left; and right at Room 1, where the odor was emanating from the doorway. It was very strong right there at the door of Room 1.

Belland asked Giordano to summon the other agents before they proceeded any further. Giordano told the waiting agents "that they had detected a very pronounced odor of smoking opium upstairs" (R. 96). Agent Moodie remained outside and agents Graben and Goode entered the hotel with Giordano (R. 96-97). Graben, who had been employed in the Bureau of Narcotics for 21 years (R. 14), testified that by "the time we had reached the top of the stairway, I recognized the odor of smoking opium." The odor at the door of Room 1 was "very pronounced"; "a very strong odor of smoking opium" (R. 97). Goode, who had been a narcotic agent for 22 years (R. 79; see R. 10), similarly testified that "When I first got upstairs, I could smell smoking opium very strong"; "when I got up close to this door, there was a very strong odor of opium coming out of this room" (R. 80).

Giordano took a position near the fire escape (R. 97), leaving Belland, Goode and Graben in front of the door to Room 1. Belland rapped on the door and identified himself and, after some delay during which "some shuffling or noise in the room" was heard, petitioner opened the door and admitted them (R. 38-39, 93; see also R. 11, 13, 15). Belland stated in his affidavit on the pre-trial motion that when the door was opened, "the odor of smoking opium was very strong" (R. 13). The affidavits of Graben and Goode were to the same effect (R. 11, 15). Bel-

land testified that he told petitioner, "I want to talk to you about this opium smell in the room here" (R. 39). Petitioner denied the existence of the smell, and Belland then informed her that she was under arrest and that they were going to search the room (R. 39, 81, 97).

The agents then proceeded to search the room (R. 39). While this was taking place, petitioner's mother and Kay Doran, who resided in different rooms of the hotel, entered the room (R. 120, 101). Petitioner immediately summoned Belland to the hallway and, according to Belland's testimony (R. 39), stated, "if you will get my mother out of here and back to her room I will come up with the opium." At this juncture agent Graben discovered concealed beneath the bedcovers, which had been "thrown back towards the wall," a one-ounce ointment jar containing 85 grains (R. 104) of opium prepared for smoking with no marks or labels, and a makeshift opium pipe. They also found under the covers a quantity (R. 105) of yen shee (partially smoked opium—see R. 46-47) lying loose on a Chinese brass tray, a metal lamp base, a metal funnel, and two yen hocks (needles used for dipping into an opium jar—R. 40). (R. 98, 39-46, 81-82.) An additional small quantity of yen shee was found in a suitcase which was in the room (R. 52-53, 81, 85).

The duration of the search until the discovery of the opium and the other items, was estimated

by government witnesses as "five minutes to eight minutes" (R. 55), "about six or seven minutes" (R. 84), and "ten or fifteen minutes" (R. 101). Petitioner testified that the search lasted "a good forty-five minutes" (R. 120; see also R. 149). In this respect, there was proof that the opium pipe was still very warm when it was found (R. 44, 82, 100), and that it takes from 10 to 15 minutes for such a pipe to cool (R. 82).

Petitioner testified that she was resting in her bed when the agents first knocked on her door about 8:45 p. m., and that she understood somebody to say it was "Mayor Devin" at the door (R. 120). Her first reaction was that whoever it was at the door was concerned with the opium and equipment (R. 120), which she claimed to be holding for a former tenant of the hotel (R. 117-118). She immediately hid the opium and equipment in the bed, and, after dressing, she opened the door (R. 120). According to her testimony, she asked Belland what he wanted and he said, "Oh, you will find out" (R. 130). In respect of her conversation in the hallway with Belland, petitioner testified that she explained that her mother and another resident who had come into the room "don't know anything about it" and that just as Belland said petitioner's mother could leave the room, the opium was discovered in the bed (R. 121). Petitioner denied Belland's testimony that she promised to surrender the opium if they would take her mother from the room, but



she admitted that she promised that "I will talk to you" if they would permit her mother and Doran, the other resident who came into the room, to leave (R. 130-131). Notwithstanding her testimony that she hid the opium immediately after Belland knocked on her door (R. 120, 128-129), petitioner denied that she knew what the agents were searching for (R. 131).

#### SUMMARY OF ARGUMENT

The agents knew that petitioner was the only person in the hotel room and they had detected the strong, unmistakable odor of smoking opium emanating from the room. This constituted, we submit, probable cause for believing that petitioner possessed opium prepared for smoking, and the agents, therefore, were justified in arresting her (*Carroll v. United States*, 267 U. S. 132, 156-157) and in searching for and seizing the contraband opium as an incident to the arrest. *Harris v. United States*, 331 U. S. 145.

In *Taylor v. United States*, 286 U. S. 1, 6, this Court recognized the reliability of "a distinctive odor as a physical fact indicative of possible crime." The majority of the lower federal courts, in appropriate circumstances, have similarly recognized that arresting officers reasonably may conclude on the basis of what they smell that a crime is being committed. *Pong Ying v. United States*, 66 F. 2d 67 (C. C. A. 3) illustrates the application of the doctrine in an opium case. A

few courts, notably the Second Circuit, have conceded that the sense of smell may be relied upon but these courts require that there also must be other corroborating evidence. See *United States v. Kronenberg*, 134 F. 2d 483 (C. C. A. 2). This doctrine is too rigid; it supplants a rule of reason with a legal formula—smell plus other corroborative evidence—and fails to give sufficient regard in each case to the nature of the odor involved and the certainty with which it can be identified.

There is no dispute here that opium, when smoked, has an unmistakable odor which is easily identified by anyone who is familiar with it. Detective Belland described the odor as "rather a sweet, sickening smell" which cannot be confused with any other odor (R. 78). The impartial authorities from which we have quoted in the Argument (*infra*, pp. 22-24) confirm Belland's testimony. That odor was identified in this case by five different persons who were familiar with it. It was traced by the arresting officers to petitioner's small combination office and sleeping room in the hotel, and when petitioner admitted the officers the fumes of smoking opium were heavy within the room. In these circumstances, the agents would have been less than reasonable if they had not concluded that petitioner—the only person in the room—possessed opium for smoking. To require here that the agents should have sought other corroborating information

would be to require that they should have corroborated the obvious.

### ARGUMENT

THE CIRCUMSTANCES THAT PETITIONER WAS THE ONLY PERSON IN HER ROOM AND THAT PERSONS WHO WERE EXPERIENCED WITH NARCOTICS DETECTED THE PUNGENT FUMES OF SMOKING OPIUM EMANATING FROM PETITIONER'S ROOM AMPLY JUSTIFIED THE ARRESTING OFFICERS IN BELIEVING THAT SHE POSSESSED SMOKING OPIUM

Under Sections 2 and 3 of the Narcotic Drugs Import and Export Act, *supra*, pp. 3-5, the mere possession of smoking opium constitutes probable cause for charging the possessor with the felony of having unlawfully imported such opium or of having received or concealed it, knowing that it was unlawfully imported. He may be indicted solely on the basis of his possession of the opium, and he may be convicted, unless the possession is explained to the satisfaction of the jury. In these circumstances, it is clear that a reasonable basis for believing that petitioner possessed smoking opium constituted probable cause for her arrest. See *United States v. Sam Chin*, 24 F. Supp. 14, 17-19 (D. Md.). And, in fact, she was arrested for this offense. The question here is whether the arresting agents were justified in believing that petitioner possessed smoking opium.

At the very outset, it must be noted that petitioner's position in this Court is inconsistent. On the one hand, great emphasis is placed on the fact that,

with the sensory knowledge they had, the agents did not obtain a search warrant or a warrant of arrest (see Br. 10, 17-18), and, on the other, it is urged (Br. 14-16) that the agent's only knowledge that an offense was being committed derived from their sense of smell and that this was not probable cause for believing that petitioner was committing an offense. If there was not probable cause in the circumstances of this case for believing that petitioner was guilty of felony, as petitioner urges, there was no basis for securing a warrant. If there was probable cause, it is settled law that the agents were entitled to make the arrest without more (*Carroll v. United States*, 267 U. S. 132, 156-157),<sup>\*</sup> and to make a reasonable search for the contraband as an incident to the arrest. *Harris v. United States*, 331

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<sup>\*</sup>The situation here is not one in which officers effect an arrest without a warrant even though they may have an adequate opportunity to secure one. As we have shown in the Statement, they went to the Europe Hotel to make an investigation and, at the initial stage of their activities, they became aware of facts which convinced them that one or more persons in room 1 were illegally in possession of opium prepared for smoking. In a sense, the arrest was made in "hot pursuit." It is no answer to suggest that one of the agents could have been sent for a warrant while the others stood guard. For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den. If any person in the room sought to leave, the agents would have been faced with the choice of permitting a suspect to flee or of arresting him. The first alternative certainly is not acceptable. The justification for the second equally justifies the arrest when it was made.

U. S. 145.\* In short, the issue here is whether in the circumstances the agents reasonably could rely on the information conveyed to them by their sense of smell and conclude that petitioner was, or recently had been, smoking opium, and thus that she possessed illicit narcotics.

The factual picture is not an unusual one. On the basis of information from an informer that some unidentified person was smoking opium in the

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\*In the State of Washington a police officer needs no warrant to make an arrest if he has reasonable grounds to believe that the person arrested has committed a felony. See *State v. Robbins*, 25 Wash. 2d 110, 169 P. 2d 246; *State v. Krantz*, 24 Wash. 2d 350, 164 P. 2d 453; *State v. Lindsey*, 192 Wash. 350, 73 P. 2d 738, certiorari denied, 303 U. S. 654. Washington, too, adheres to the doctrine that as an incident to a lawful arrest, the defendant's premises may be searched for instrumentalities of the crime. See *State v. Evans*, 145 Wash. 4, 258 Pac. 845; *State v. Thomas*, 183 Wash. 643, 49 P. 2d 28.

The problem raised in *United States v. Di Re*, No. 61, this Term, whether the arresting officers apprised the defendant of their authority and the cause for the arrest, is not present here. The evidence shows that when Belland knocked on petitioner's door he identified himself as "Detective Lieutenant Belland" (R. 38, 80, 93, 97); that when the door was opened, he informed petitioner that "I want to talk to you about this opium smell in the room here" (R. 39); and that petitioner knew she had been arrested for an offense involving the possession of opium because she offered to "come up with the opium" if Belland would get her mother out of the room (R. 39). Petitioner's testimony that she did not know what the agent's were searching her room for (R. 131) is also belied by her own testimony (R. 120) that when Belland knocked on her door the "first thing that naturally struck me" was to conceal the opium and the equipment for smoking it.



hotel, the agents undertook an investigation. And, as is not unreasonable, their first contemplated source of inquiry was the manager of the hotel. For if anyone was smoking opium in the hotel, the manager most likely would know who it was, or, at the very least, would be anxious to assist the agents in learning who it was. Detective Belland and agent Giordano, both experienced in the narcotics field, went into the hotel and proceeded to the very first room reached upon entering—petitioner's combination office and sleeping room at the head of the entrance stairway. They perceived the odor of burning opium in the hotel, and the closer they came to their first place of inquiry the stronger the odor became. The odor was strongest immediately in front of the door to petitioner's room, and the agents confirmed their then strong suspicions by sniffing at the crack between the door and the sill and ascertaining that the odor which they had detected was emanating from that room. Two additional agents, also experienced with narcotics, were summoned and when they entered the hotel they, too, underwent the same experience as Belland and Giordano. At this juncture, four agents and an opium user all had reached the same conclusion—that someone was smoking opium in the hotel—and, to paraphrase Belland's testimony, by "following their noses" the agents concluded that whoever was doing so was in Room 1. It was only then that they knocked on the door and identified

themselves. When the door was opened by petitioner, the odor of smoking opium became more intense. Petitioner admitted the agents; she was alone in the room. They announced the purpose of their visit, and they immediately placed her under arrest. Incident thereto, they searched the room for the contrabrand opium, which they easily found, at the same time that petitioner was agreeing with detective Belland that she would "come up with the opium" if her mother were permitted to leave the room.

We agree with petitioner (Br. 11) that "the determinative question here is whether or not the arrest was legal." And we need not dispute petitioner's contention (Br. 11-13) that the information conveyed by the informer that someone in the hotel was smoking opium was not of itself probable cause justifying the arrest. In our view, the only significance of the informer in this case lies in the fact that he, also a user of narcotics, easily detected the odor of smoking opium in the hotel. We firmly disagree, however, with petitioner's basic contention that the agent's knowledge perceived through their sense of smell could not in this case afford a foundation for reasonably concluding that petitioner possessed smoking opium. It is our position that, like the sense of sight, the sense of smell may in some circumstances convey to the mind convincing knowledge that a prohibited act is taking place. We shall show that burning opium gives off a strong, un-

mistakably identifiable odor; that witnesses for the Government and a witness for petitioner agreed that a person familiar with the odor can identify it without difficulty; that in this case, five persons experienced with narcotics quickly recognized the odor and that it was traced to its source—petitioner's room; and that when the agents were admitted into the room and found only petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic.

The general legal principles as to what constitutes probable cause are not in dispute. The accepted definitions of probable cause are those adopted with approval from state cases by this Court in *Stacey v. Emery*, 97 U. S. 642, 645:

\* \* \* A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.

\* \* \* Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. \* \* \*

Or, as this Court, again quoting a state case, said in *Carroll v. United States*, 267 U. S. 132, 161, "The substance of all the definitions is a reasonable ground for belief in guilt."

This Court has emphasized that actual guilt need not be established to show probable cause; that it is sufficient if the officer acts as a reasonably prudent man:

\* \* \* To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. [*Husty v. United States*, 282 U. S. 694, 700-701.]

In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. [*Dumbra v. United States*, 268 U. S. 435, 441.]

The test of the validity of an arrest, in other words, is reasonable deduction, not proof beyond a reasonable doubt. The controversy arises from the application of these principles, and it is to that question that we now turn.

#### A. SMOKING OPIUM HAS A DISTINCTIVE AND UNMISTAKABLY IDENTIFIABLE ODOR

Detective Belland described the smell of smoking opium (R. 78) as follows:

It is rather a sweet, sickening smell or odor. Once you have smelled it you don't confuse it with any other smell. You just recognize it when you smell it again.\*

Petitioner's witness, Hutchinson, who was experienced with opium, testified similarly that he might not be able to ascertain by sight whether a person had been smoking opium, but that "I could tell the smell of opium" (R. 157). In

\* "The taste of the half-fluid extract [smoking opium] is sweetish and oily, somewhat like rich cream, but the smell of the burning drug is rather sickening." 2 Williams, *The Middle Kingdom* (1848), p. 390.

*United States v. Sam Chin*, 24 F. Supp. 14, 16 (D. Md.), the court took testimony on the question whether burning opium has a recognizable odor; the opinion states: "The testimony is convincing and uncontradicted that burning opium has a smell that is peculiar and unique to itself and once perceived cannot be forgotten."

Such testimony is confirmed by recourse to the usual sources of impartial information. The *Encyclopedia Britannica* (Vol. 16, 14th Ed., p. 811) describes smoking opium as a "black treacly substance, having the fragrant opium-like odour which is characteristic." Opium "has a peculiar, heavy, narcotic, disagreeable smell." *Homeopathic Pharmacopoeia of the United States* (Sixth Ed. 1941) p. 434. The *British Pharmacopoeia* (1932) p. 316, describes the odor as "strong and characteristic," and the *United States Pharmacopoeia* (XIII Ed.) p. 359, describes it as "odor characteristic, narcotic." The smell of opium "is peculiar, and perfectly *sui generis*; it is not unpleasant, and in recently well-prepared opium is somewhat fruity." *2 Encyclopedia of Chemistry* (1880) p. 486. War Department Field Manual 19-20, p. 192, describes opium in its raw state as "a dark brown, sticky gum with an acrid, bitter, nauseous taste and heavy, characteristic odor." *Opium Smoking*, by H. H. Kane, M. D. (1882), p. 31, states:

The process of seething the crude opium is exceedingly unpleasant to those unaccustomed to it, from the overpowering nar-



cotic fumes which arise; *and this odor marks every shop where it is prepared, and every person who smokes it.*<sup>1</sup>

Similarly, Terry and Pellens in *The Opium Problem* (1928), state (p. 74):

The equipment required, *the odor of the burning drug* and later its cost all-combined to make relatively easy the closing of the places where the drug was used in this form, once public opinion and police activities were awakened.

That burning opium has a characteristic, unmistakably identifiable odor is further confirmed by the Report of the Committee Appointed by the Philippine Commission to Investigate the Use of Opium and the Traffic Therein, Sen. Doc. No. 265, 59th Cong., 1st sess. The Committee made a study of the use and control of opium in Japan, Formosa, the Philippine Islands, and other areas in which the opium problem existed. In discussing the situation in Japan, the committee reported that the opium law there was "prohibitive and effective," and stated (p. 22):

At first the committee was inclined to be somewhat skeptical of the efficiency of the law so far as it touches the Chinese, especially as these are settled chiefly in the coast towns, where their well-known ingenuity in smuggling and the ease with which the commodity can be conveyed secretly into the country

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<sup>1</sup> All italics have been added.

affords facilities for evasion. But apparently the vigilance of the police is such that even when opium is successfully smuggled in it cannot be smoked without detection. *The pungent fumes of cooked opium are unmistakable and betray the user almost inevitably.*

We reiterate that five different persons who were familiar with the odor of burning opium entered the Europe Hotel and were convinced beyond any doubt that someone in the hotel was smoking opium.\* Odekirk, the informer, told Belland that he had been in the hotel and that "the place was reeking with opium smoke" (R. 57). Under Belland's direction, he entered the hotel a second time and reassured himself through his sense of smell that someone was smoking opium at that time (R. 69). Belland, the city detective who had been in narcotics work for 12 years, noticed the "strong odor of opium smell"

\* Petitioner was asked on direct examination: "Did you smell anything peculiar about your room that evening when the officers came?" She answered, "No, I wouldn't, because I had been painting for so long that I didn't know." (R. 123.) Petitioner also testified that shortly after the agents entered the room, Kay Dofan, a resident at the hotel, came to the room and that one of the agents asked her, "Can't you smell anything?" and that she replied, "Well, I don't know. I am smoking a cigarette" (R. 120). Petitioner's mother denied that she had ever smelled smoking opium around the hotel (R. 147) and that she smelled anything unusual in petitioner's room on the night of the arrest (R. 148; see also, R. 149). Another witness for petitioner who did not live at the hotel testified generally that whenever he was in the hotel he never noticed the smell of opium (R. 158).

as he ascended the entrance stairway toward Room 1, the combination office-sleeping room; "there was a strong odor coming out between the sill and the door" of Room 1 (R. 38; see also R. 74). In Belland's words (R. 73), "Our nose just led us right up to the crack of that door." Agents Giordano (R. 92), Graben (R. 96-97), and Goode (R. 80) all testified that their experiences on entering the hotel were the same.\* And when petitioner opened the door and admitted the officers, they saw that she was alone in the room.

The case is thus one where law enforcement officers skilled in tracking down illicit opium and other narcotics were convinced in their own minds that the crime of possessing smoking opium was being committed by petitioner in Room 1 of the hotel. The question is simply whether it was reasonable for them to predicate their judgment on the existence of the pungent odor readily identified by five persons as the unmistakable odor of burning opium which the officers easily traced to the room found to be occupied by petitioner alone. The reasonableness of their conclusion is illustrated, we think, by the every-day experience of every-day people (and this includes law enforcement officers) in predicating action, in appropriate situations, solely on what they perceive through their sense of smell.

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\* The fourth agent, Moodie, had been stationed outside (R. 97) and was not a witness at the trial.

Liquefied petroleum gases for heating and cooking purposes strikingly illustrate a situation in which society recognizes the sense of smell as a reliable source of knowledge. Thus, some states have required that such gases be odorized by the addition of a malodorant agent perceptible to a person with an average olfactory sense.<sup>10</sup> Gas is not perceptible through the sense of sight, nor is it something which a person can feel with his hands. Yet no one would seriously urge that if a person smells gas emanating from his neighbor's home he should not immediately enter the house, and attempt to save the lives of whoever might be there. Indeed, if the agents in this case had detected the odor of gas emanating from petitioner's room, instead of the odor of burning opium, they would have been remiss in their responsibility to society, both as law enforcement officers and as human beings, if they had not entered the room for the purpose of saving her from the ill effects of the gas. The situation is no different because the agents were attracted to the room for law enforcement purposes. Once the distinctiveness of the odors is recognized, as it must be, there is no room for differentiating the two situations so far as they involve probable cause for the action taken.

During the recent war a "Commando Sniff Kit" was developed by the military forces for

<sup>10</sup> See Beinfang, *The Subtle Sense* (1946), pp. 79-84.

the purpose of training specialized troops in olfactory scouting.<sup>11</sup> Similarly, officials of the Office of Civilian Defense early recognized the importance of the sense of smell in detecting enemy gas attacks. Local air raid wardens received training in identifying the various gases known to chemical warfare, which consisted in part of periodically smelling the various gases until they were able to identify each by its odor. See *Protection Against Gas*, United States Government Printing Office (1941), pp. 33-36. The training which the air raid wardens received is no different than that which narcotic agents undergo in the day to day performance of their duties.

There are manifold situations in which persons with a normal sense of smell are able to detect an identifiable odor and to distinguish it from all others. Thus, for example, it may be doubted that anyone who has experienced the smell of burning rubber would have any difficulty in again recognizing the odor. The odor of alcohol on the breath is a common basis for ascertaining whether a person has been drinking intoxicating beverages. The perfume industry seemingly is founded on the proposition that the conduct of man is influenced by what he smells.

The courts long have recognized that activities which are objectionable because of their im-

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<sup>11</sup> See Beinfang, *supra*, at pp. 88-89.



pact upon the olfactory sense may furnish a basis for legal redress. The law of nuisance is filled with cases in which damages have been allowed or injunctions granted because particular odors have been found to be offensive to persons who are subjected to them. See for example, *United States v. Luce*, 141 Fed. 385 (C. C. D. Del.), where the nauseating odor of decaying fish from a fish fertilizer factory was recognized to be an actionable wrong. See also, *Fertilizing Company v. Hyde Park*, 97 U. S. 659 (stench from offal transported from slaughterhouse to defendant's fertilizer plant); *De Blois v. Bowers*, 44 F. 2d 621 (D. Mass.) (fumes and odors from steel galvanizing plant); *City of Temple v. Mitchell*, 180 S. W. 2d 959 (Tex. Civ. App.) (odor and flies from sewage plant); *Lead v. Inch*, 116 Minn. 467, 134 N. W. 218 (odor from stable); *Mitchell v. Hines*, 305 Mich. 296, 9 N. W. 2d 547 (offensive odor from feeding garbage to pigs); *Keene v. City of Huntington*, 79 W. Va. 713, 92 S. E. 119 (smoke and offensive odor from incinerator plant). And see 1 Moore, *A Treatise on Facts* (1908) 364-369, for a collection of other cases in which the sense of smell was a determinative factor.

Our argument does not mean that the sense of smell always affords a reliable basis for action. Many odors are not strong enough or distinctive enough to be relied upon as a basis for action

without corroboration by some of the other senses. See, *infra*, pp. 33-34. But in this respect the sense of smell is in no different status than the other senses. While the sense of sight is a reliable basis for action, there are circumstances in which it might be inadequate—as, for example, in the black of night. The sense of hearing can distinguish between many sounds, but we know that it does not receive certain high pitch sounds. Like smell, the sense of taste—which is many thousand times less acute than the sense of smell<sup>12</sup>—likewise is a reliable guide only where the taste is distinctive. With respect to all the senses, their reliability as a basis for reasonable action must be judged in each case on a consideration of all the surrounding circumstances. Thus, in judging action based on the sense of smell, it is important to consider the distinctiveness of the odor involved, the physical conditions in which it existed, and the opportunity which there was to subject the olfactory organ to the odor.

In this case, there is no dispute that burning opium gives off a pungent odor which can readily be identified by a person familiar with it. The odor here originated in a small room and there is no evidence that the window was open or that other circumstances existed which would have diffused the odor, and thus have made it less recognizable. And finally, there is the fact that skilled

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<sup>12</sup> Best and Taylor, *Physiological Basis of Medical Practice* (4th ed. 1945) 1054.

officers who were thoroughly familiar with the odor unanimously and beyond any doubt identified and traced it to a room occupied only by petitioner.

B. IN APPROPRIATE CIRCUMSTANCES THE SENSE OF SMELL ALONE MAY BE RELIED UPON AS EVIDENCE THAT A CRIME IS BEING COMMITTED, AND THE WEIGHT OF JUDICIAL AUTHORITY SO HOLDS

We do not rely upon practical considerations alone to support our position in this Court. Beginning with *McBride v. United States*, 284 Fed. 416, decided by the Fifth Circuit twenty-five years ago, a substantial body of authority has developed which accepts the doctrine that in appropriate circumstances the sense of smell may be relied upon as evidence that a crime is being committed.<sup>13</sup> In the narcotics field, the decision of the Third Circuit in *Pong Ying v. United States*, 66 F. 2d 67, illustrates the application of the doctrine. The facts there were substantially similar to the facts here and in upholding the arrest and incidental search and seizure the court stated (66 F. 2d at 67-68):

Now here we have not a mere suspicion that a violation of law had been committed or was likely to be committed, but one of

<sup>13</sup> In the *McBride* case prohibition agents acting on the basis of their detection of the fumes of whiskey in the process of manufacture searched a stable and arrested persons who were operating a still found in the stable. For the purpose of obtaining a decisive ruling on the question, the Government consented to the granting of the defendant's petition for a writ of certiorari in this Court, but certiorari was denied, 261 U. S. 614.

the then actual commission of an unlawful act. There was some one within the room. Unburning opium in a room would, of course, cause no fumes, but burning opium would. So the fact of escaping opium fumes was evidence to the officers that opium was being used and burned in that apartment. \* \* \*

With these facts before the narcotic officers, we think they would have been derelict in their duty had they not acted promptly and effectively to enter and search the apartment. What constitutional rights were violated in their so doing? The defendant, whose counsel claims constitutional protection for him, was within and in control of apartment No. 5. Some one within those premises created the fumes of the unlawful drug which unerringly brought the officers following the fumes face to face with the entrance thereto. The proof of guilty conduct within the apartment was evidenced outside the door. To throw a shield of constitutional protection over a lawbreaker who has himself created the evidence on the outside of his premises that the law is being violated within such premises is to make the constitutional provision not a means of protecting against unwarranted entrance, but a barrier to lawful entrance by a vigilant officer where the evidence of lawbreaking comes from the premises thus sought to be shielded from all efforts to enforce the law. The

claim of constitutional privilege in this case has not a trace of legality in it.

Similarly, in *United States v. Borkowski*, 268 Fed. 408 (S. D. Ohio), an arrest without a warrant was justified where prohibition agents detected the odor of raisins cooking. In the words of the court (268 Fed. at 412):

If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue laws was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight.

Other courts have similarly stated the rule. See, e. g., *United States v. Sam Chin*, 24 F. Supp. 14 (D. Md.); *Wida v. United States*, 52 F. 2d 424, 425 (C. C. A. 8); *Catagrone v. United States*, 63 F. 2d 931, 932 (C. C. A. 8); *Benton v. United States*, 28 F. 2d 695, 696 (C. C. A. 4); *De Pater v. United States*, 34 F. 2d 275, 276 (C. C. A. 4);



*Lee Kwong Nom v. United States*, 20 F. 2d 470 (C. C. A. 2);<sup>14</sup> *United States v. White*, 29 F. 2d 294 (D. Neb.); *United States v. Rellie*, 39 F. Supp. 21 (E. D. N. Y.); *United States v. Seiler*, 40 F. Supp. 895 (D. Md.); *United States v. Fischer*, 38 F. 2d 830 (M. D. Pa.).

Another line of cases, which seems to have had its growth as a result of the Court's decision in *Taylor v. United States*, 286 U. S. 1, does not deny that the sense of smell may be relied upon, but insists that it must be corroborated by other information before it constitutes probable cause for believing that an offense is being committed. See, e. g., *United States v. Kronenberg*, 134 F. 2d 483 (C. C. A. 2); *United States v. Kaplan*, 89 F. 2d 869 (C. C. A. 2); *Cheng Wai v. United States*, 125 F. 2d 915 (C. C. A. 2); *United States v. Lee*, 83 F. 2d 195 (C. C. A. 2); *United States v. Schultz*, 3 F. Supp. 273 (D. Ariz.); *United States v. Tom Yu*, 1 F. Supp. 357 (D. Ariz.).<sup>15</sup>

Our sole disagreement with the doctrine enunciated by the latter cases is that it is too rigid. It supplants the rule of reasonableness with a legal

<sup>14</sup> Compare later decisions of the Second Circuit cited in the following paragraph:

<sup>15</sup> We do not include cases such as *United States v. Kind*, 87 F. 2d 315 (C. C. A. 2), where "the offense consisted of possession of unstamped alcohol, and the presence of alcohol on the premises, even if smell were enough to detect it, did not prove the case." *United States v. Kaplan*, 89 F. 2d 869, 870 (C. C. A. 2). See *United States v. Seiler*, 40 F. Supp. 895 (D. Md.); cf. *Grau v. United States*, 287 U. S. 124.

formula—smell plus other corroborative evidence—and fails to give sufficient regard in each case to the nature of the odor involved and the certainty with which it can be identified. Compare *De Pater v. United States*, 34 F. 2d 275, 276 (C. C. A. 4). Thus, for example, the Second Circuit in *United States v. Lee*, 83 F. 2d 195, *supra*, doubted whether the odor of opium which was in the bedroom could be smelled at the outer door of an apartment. In such circumstances, it may well be that there is no sufficient basis for believing that an offense is being committed. The situation in this case is quite different. The agents smelled the odor of burning opium immediately outside the door of petitioner's room—and the door was an ill-fitting one which permitted the odor to seep out (R. 75). Five persons, all thoroughly familiar with the odor of burning opium, were convinced beyond any doubt that the odor which they detected was that of smoking opium. Quite plainly, there would not have been an odor of smoking opium unless someone in the room was or recently had been smoking the narcotic. That person was identified as soon as petitioner opened the door to her room. In such circumstances, to insist that the agents must seek additional corroboration is to require that they should corroborate the obvious. It substitutes for the test of reasonableness a rule of thumb which may be satisfactory in many cases, but which certainly does not lead to a sensible result in a case such as the pres-

ent one, where the information which the agents had convincingly demonstrated that petitioner possessed opium for smoking.

As we have said, the decision of this Court in *Taylor v. United States*, 286 U. S. 1, seems in large measure to have led some of the lower courts to adopt the formula of smell-plus-something-else. By quoting a single sentence from the opinion, 286 U. S., at 6—"Prohibition officers may rely upon a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search"—these courts have claimed justification for the doctrine which they have adopted. Analysis of the *Taylor* decision, we believe, demonstrates their misconception. See *Pong Ying v. United States*, 66 F. 2d 67, 68 (C. C. A. 3); *United States v. Sam Chin*, 24 F. Supp. 14, 20 (D. Md.).

In the *Taylor* case prohibition agents detected the odor of whiskey coming from within a garage. Through a small opening they saw many cardboard cases which they thought probably contained jars of liquor. No one was in the garage and the agents had no basis for believing otherwise. With no purpose of making an arrest and solely with a view to searching the garage, the agents broke into it and commenced to search it. In the course of the search the defendant came upon the scene and was arrested. 286 U. S. at 5. The Government, in effect, confessed error in this

Court, and the Court held that the search without a warrant was unreasonable. The opinion emphasized that the case, unlike the present one, was not one in which there was a search and seizure incident to an arrest. Instead, the issue in the case was whether it was reasonable in the circumstances to make the search without first obtaining a search warrant. It was because the agents had abundant opportunity to first secure a warrant that the Court held the search to be unreasonable. We find nothing in the opinion to support the assumption of the Second Circuit that the holding of unreasonableness was based upon the fact that the prohibition agents acted on the basis of what they smelled. In the present case there was, of course, no necessity for obtaining a search warrant if there was probable cause for the arrest of petitioner. A search for the contraband (see *supra*, p. 15) incident to the arrest was reasonable. *Harris v. United States*, 331 U. S. 145.

In the *Taylor* case, the Court plainly recognized the reliability of "a distinctive odor as a physical fact indicative of possible crime." 286 U. S. at 6. The words which follow—"but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search"—mean to us that even though there may have been probable cause for believing that illicit whiskey was in the garage, the agents should have relied upon it to obtain a search warrant instead of breaking into the garage. Indeed, implicit in

the opinion is the assumption that, based on what they knew from their sense of smell, the agents had probable cause for obtaining such a warrant. In this aspect of the case, the present case draws considerable support from the *Taylor* decision. Certainly, there is nothing in the opinion which requires the conclusion that no matter how convincing an identifiable odor is, it is never an adequate basis for believing that a crime is being committed unless it is corroborated by some other fact independently perceived through another sense.

In sum, we submit that the court below correctly held (R. 220-221) that petitioner's arrest was justified. The agents had information that someone was smoking opium in the hotel; the telltale odor of burning opium led them unerringly to petitioner's room; the odor was strong within the room; only petitioner was in the room when the door was opened; no one had left the room, all exits having been under observation. In these circumstances, the officers had reasonable grounds to believe that petitioner was committing the felony of possessing opium and thus had probable cause to arrest her.

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• Throughout her brief petitioner has woven two contentions which require but brief comment. She suggests (Br. 5, 18, 20) that the agents' testimony at the trial improved the facts recited in their affidavits in opposition to the motion to suppress, the im-



plication being that they may have testified falsely. A careful examination of the affidavits in the light of the testimony at the trial is convincing that there is no basis in fact for petitioner's assertion. As would be expected, the testimony at the trial is much more detailed, much of the detail having been developed by petitioner's counsel in cross-examining the agents (see, e. g., R. 47-78). It is because the testimony at the trial furnishes a clearer factual picture of what occurred that we have relied primarily upon it in the Statement and Argument. In every essential respect the facts as related in the affidavits and at the trial are the same.

The other suggestion by petitioner (Br. 6-7, 17-18) rests on two fragments of testimony at the trial. Detective Belland testified (R. 66) that he had been working with the narcotic agents in investigating a "large shipment of opium which was brought into this territory," and in describing the events when the agents first entered petitioner's room, Belland testified (R. 39) that he said to petitioner, "I want you to consider yourself under arrest because we are going to search the room." On the basis of this testimony petitioner argues that this is a case in which law-enforcement officers entered her room ostensibly for the purpose of making an arrest but in reality for the purpose of making a search for opium without a warrant. See *Harris v. United States*, 331 U. S. at 153. The fact that the agents were investigating a large

shipment of opium demonstrates nothing more than that they had reason to suspect an increase in the use of opium in that area and that they probably were alert to follow every lead which might disclose the persons who had obtained the contraband. It does not mean or even create a permissible inference that the agents were purposely searching for opium without warrants or probable cause. Similarly, Belland's statement to petitioner is not entitled to the sinister connotation which she now ascribes to it. The testimony of the other agents at the trial (R. 81, 97) demonstrates that Belland's description of what he said to petitioner when she was arrested was merely his manner of expressing, somewhat inartfully and without thought of the possible legal implications which might be drawn from his language, that what actually happened was that she was told that she was under arrest and the agents then commenced a search for the opium which, of course, was contraband. The search followed a lawful arrest, it was not long in duration, and it was directed to the discovery of the opium. There was no search for mere evidence of crime.

It is plainly shown by the evidence that when the agents entered the Europe Hotel they did so to investigate the smell of smoking opium of which they had been apprised, and they proceeded to the manager's room to seek assistance from her. When it became apparent to them that the opium

was being smoked in her room they had no alternative but to arrest her and to search for the opium which, it was reasonable to assume, was in the room. To suggest that this was a sham arrest as a guise for making an unlawful search is to disregard the facts which convincingly demonstrate exactly the opposite.

#### CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the circuit court of appeals is correct and that it should therefore be affirmed.

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DECEMBER 1947.

# SUPREME COURT OF THE UNITED STATES

No. 329.—OCTOBER TERM, 1947.

Anne Johnson, Petitioner,  
v.  
The United States of America.

On Writ of Certiorari  
to the United States  
Circuit Court of Ap-  
peals for the Ninth  
Circuit.

[February 2, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner was convicted on four counts charging violation of federal narcotic laws.<sup>1</sup> The only question which brings the case here is whether it was lawful, without a warrant of any kind, to arrest petitioner and to search her living quarters.

Taking the Government's version of disputed events, decision would rest on these facts:

At about 7:30 p. m. Detective Lieutenant Belland, an officer of the Seattle police force narcotic detail, received information from a confidential informer, who was also a known narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. Belland communicated with federal narcotic agents and between 8:30 and 9 o'clock went back to the hotel with four such agents. All were experienced in narcotic work and recognized at once a strong odor of burning opium which to them was distinctive and unmistakable. The odor led to Room 1. The officers did not know who was occupying that room. They knocked and

<sup>1</sup> Two counts charged violation of § 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)) and two counts charged violation of the Narcotic Drugs Import and Export Act as amended (21 U. S. C. 174).

a voice inside asked who was there. "Lieutenant Beland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said; "I want to talk to you about the opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room." The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. This evidence the District Court refused to suppress before trial and admitted over defendant's objection at the trial. Conviction resulted and the Circuit Court of Appeals affirmed.<sup>2</sup>

The defendant challenged the search of her home as a violation of the rights secured to her, in common with others, by the Fourth Amendment to the Constitution. The Government defends the search as legally justifiable, more particularly as incident to what it urges was a lawful arrest of the person.

### I.

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a

<sup>2</sup> 162 F. 2d 562.



constitutional right. Cf. *Amos v. United States*, 255 U.S. 313.

At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant's contention, erroneously made, on the strength of *Taylor v. United States*, 286 U.S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.<sup>3</sup> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment

<sup>3</sup> In *United States v. Lefkowitz*, 285 U.S. 452, 464, this Court said: "... the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime . . . ."

to a nullity and leave the people's homes secure only in the discretion of police officers.\* Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to

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\* "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U. S. 20, 33.

that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

## II.

The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.<sup>5</sup>

The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant.<sup>6</sup> It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might

<sup>5</sup> This is the Washington law. *State v. Symes*, 20 Wash. 484; *State v. Lindsey*, 192 Wash. 356; *State v. Krantz*, 24 Wash. 2d 350; *State v. Robbins*, 25 Wash. 2d 110. State law determines the validity of arrests without warrant. *United States v. Di Re*, — U. S. —, decided January 5, 1948.

<sup>6</sup> The Government brief states that the question presented is "whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room."

have been an opium smoking den." And it says, " . . . that when the agents were admitted to the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic." Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.<sup>7</sup>

Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects,"<sup>8</sup> and would obliterate

<sup>7</sup> The Government also suggests that "In a sense, the arrest was made in 'hot pursuit'. . . ." However, we find no element of "hot pursuit" in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape. Nor would these facts seem to meet the requirements of the "Washington Uniform Law on Fresh Pursuit." Session Laws 1943, ch. 261.

<sup>8</sup> In *Gouled v. United States*, 255 U. S. 302, 303, this Court said: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States*, 232 U. S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two (Fourth and Fifth) Amendments. The effect of

one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

*Reversed.*

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE BURTON dissent.

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the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."